TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 180

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL., PETITIONERS,

vs.

RISS AND COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 13, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. A]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION #89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON and ELVIN PEAY, Plaintiffs-Appellants,

versus

RISS AND COMPANY, INC., Defendant-Appellee.

Appeal From the United States District Court for the Western District of Kentucky, at Louisville, Kentucky, Henry L. Brooks, Judge.

Appendix for Plaintiffs-Appellants

[fol. 1]

RELEVANT DOCKET ENTRIES

1960

5–17 Complaint filed with Exhibit A. Summons issued and delivered to U. S. Marshal with copy of Complaint and Exhibit A.

7–21 "Answer and Counterclaim" filed by H. Bemis Lawrence, Attorney for Defendant.

1961

2– 2 Order dated 2-2-61 signed by Judge Brooks—motion of defendant to dismiss sustained and complaint dismissed. Copies to Ralph H. Logan and H. Bemis Lawrence.

3– 1 Appeal Bond ($250.00 cash bond), General Drivers, Warehousemen and Helpers, Local #89, Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay, principals, by Ralph Logan, their attorney, and Ralph Logan, surety—filed.

[fol. 2]

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON, and ELVIN PEAY, Plaintiffs,

v.

RISS AND COMPANY, INC., 3433 S. 7th Street, Louisville, Kentucky, Serve: Joseph O. Mathes, Defendant.

COMPLAINT—Filed May 17, 1960

1. The Plaintiff, General Drivers, Warehousemen and Helpers, Local Union #89, is a labor organization as defined in Section 2, Sub-section (5), of the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter called the Act, and has its principal place of business at 3813 Taylor Boulevard, Louisville, Jefferson County, Kentucky, hereinafter referred to as Local #89.

2. The Plaintiffs, Virgil Peay, John Kendall and Elvin Peay, are residents of the State of Indiana, and Sylvester Davidson, Newton Stucker and George Abell are residents of Louisville, Kentucky, and are members of said Local #89 and employees of the Defendant, Riss and Company, Inc. [fol. 3] at Louisville, Kentucky, and are employees as defined in Section 2, Sub-section (3) of the Act.

3. (a) The Defendant, Riss and Company, Inc., hereinafter called Riss, is a Delaware corporation engaged in the interstate transportation of freight by motor vehicle, as a common carrier, under Certificates of Convenience and Necessity issued by the Interstate Commerce Commission, and as such carrier, maintains a freight terminal at 3433 S. 7th Street, Louisville, Kentucky.

(b) Now, and at all times material herein, Riss is and has been engaged in "commerce" and in operations "affecting commerce", as defined in Section 2, Sub-sections (6) and (7) of the Act, respectively.

(c) Riss is an "employer", as defined in Section 2, Subsection (2) of the Act.

4. Jurisdiction is conferred upon this Court by Section 301 of the Act. 29 U.S.C.A. 185.

5. Plaintiff, Local #89, is the collective bargaining agent of its co-Plaintiffs herein with the Defendant and as such entered into a contract with the Defendant concerning the wages, hours and working conditions of said co-Plaintiffs. Said contract is filed herewith, made a part hereof and marked Exhibit "A". Said contract at all times herein has been in full force and effect between all the parties hereto.

6. On or about January 25, 1960, pickets were placed at the place of business of Defendant in Louisville, Kentucky, by a labor union located in Philadelphia, Pennsylvania and between whom a labor dispute existed between said Philadelphia labor union and the Defendant herein. That the Plaintiffs, Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay, employees of the Defendant at Louisville, Kentucky, chose to respect and did respect the picket line of said [fol. 4] Philadelphia labor union. On February 15, 1960, said six named Plaintiffs reported to the Defendant for work, and the Defendant refused to permit them to resume their labor and still refuses to permit said six named Plaintiffs to resume work for said Defendant.

7. Plaintiffs, Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay, as a result of being denied employment by Defendant, in accordance with Article VII. and Article VIII. of the contract heretofore filed as Exhibit "A" herein, filed grievances against the Defendant seeking to recover pay for all time lost from February 15, 1960, until the time of reinstatement.

8. Said grievances were processed through the channels as provided in the contract and finally referred to the

Joint Area Cartage Committee at Chicago, Illinois. That said Joint Area Cartage Committee, after hearing the grievances by said Plaintiffs, directed that said Plaintiffs be reinstated by the Defendant with full seniority and paid for all time off. Demands were made upon the Defendant to reinstate said six Plaintiffs and th pay them for all time off in accordance with the ruling of the Grievance Committee of the Joint Area Cartage Committee, and said Defendant has refused and still refuses to reinstate said six Plaintiffs or to pay them for any time since February 15, 1960.

9. It is further a provision of said contract, Article IX., that "it shall be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union • • • "

10. Said contract provides that the Defendant shall contribute to a Health and Welfare Fund the sum of $2.50 per week for each employee covered by said contract. That the Defendant has failed and refused to pay said sum [fol. 5] for each of said six employees since February 15, 1960, contrary to the provision of said contract.

11. It is further provided by Article XXV. of said contract that effective February 1, 1960, the Defendant shall pay into a Pension Plan for its employees the sum of $4.00 per week per employee. That the Defendant has failed to pay said $4.00 per week for each of said six Plaintiffs since February 15, 1960, all contrary to the provisions of said contract.

12. (a) The Plaintiff, Newton Stucker, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to two weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since September, 1949.

13. (a) The Plaintiff, Sylvester Davidson, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to two weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since September 15, 1948.

14. (a) The Plaintiff, John Kendall, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to three weeks vacation pay under the provisions of Article XXII. of said contract, he [fol. 6] having been employed by the Defendant since October 4, 1947.

15. (a) The Plaintiff, Elvin Peay, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to two weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since October, 1948.

16. (a) The Plaintiff Virgil Peay, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to three weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since August 11, 1947.

17. (a) The Plaintiff, George Abell, states that his guaranteed weekly wages under said contract is the sum of $115.60 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to two weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since September 13, 1954.

Wherefore, Plaintiffs demand Judgment against the Defendant:

1. That said six employees be reinstated with full seniority under the terms of said contract.

[fol. 7] 2. For the sum of $2.50 per week per employee to be paid to the Health and Welfare Fund from February 15, 1960, and the sum of $4.00 per week per employee from February 15, 1960, to be paid to the Pension Plan, all in a lump sum until the date of reinstatement of said employees and thereafter, under the terms of the contract.

3. In favor of Newton Stucker in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $217.60 for two weeks vacation pay.

4. In favor of Sylvester Davidson in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $217.60 for two weeks vacation pay.

5. In favor of John Kendall in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $326.40 for three weeks vacation pay.

6. In favor of Elvin Peay in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $217.60 for two weeks vacation pay.

7. In favor of Virgil Peay in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $326.40 for three weeks vacation pay.

8. In favor of George Abell in the sum of $115.60 per week from February 15, 1960, until he is reinstated, and in the further sum of $231.30 for two weeks vacation pay.

9. For the costs of this action and for all other relief to which they may appear to be entitled.

Hardy & Logan, 506 W. Jefferson Street, Louisville 2, Kentucky, JUniper 3-8371, By ....., Attorneys for Plaintiffs.

[fol. 8]

IN THE UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT—February 2, 1961

A pre-trial conference was held in chambers on February 2, 1961 and there appeared Mr. Ralph H. Logan, for the plaintiffs, and Mr. H. Bemis Lawrence, for the defendant.

The question of jurisdiction having been considered and it appearing that this action is controlled by Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437, 99 L. Ed. 510, 75 S. Ct. 488 (1955),

It Is Ordered that the motion of the defendant, Riss and Company, Inc., to dismiss is sustained and the complaint dismissed.

Henry L. Brooks, United States District Judge.

February 2, 1961.

For the Plaintiffs: Mr. Ralph H. Logan, 506 West Jefferson St., Louisville, Kentucky.

For the Defendant: Mr. H. Bemis Lawrence, 1129 Kentucky Home Life Bldg., Louisville, Kentucky.

A Copy Attest, Martin R. Glenn, Clerk, by Loraine Miller, Deputy Clerk.

[fol. 9]

EXHIBIT "A" TO COMPLAINT

Central States
Area

LOCAL CARTAGE
AGREEMENT

Covering Employees
of Private, Common,
Contract and Local
Cartage Carriers

for the period of
February 1, 1958, to January 31, 1961
(Union Label)

ARTICLE VIII.

Grievance Machinery and Union Liability.

Section 1. The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise.

Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a Joint Local Area Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint State Cartage Committee. Such a decision will be final and binding on both parties.

(b) Where a Joint Local Area Committee is unable to agree or come to a decision on a case, or where there is no such committee, it shall, at the request of the

[fol. 10] Union or the Employer involved, be appealed to the Joint State Cartage Committee at the next regular constituted session.

Minutes of the local committee shall set forth the position and facts relied on by each party, but each party may supplement such minutes at the hearing before the Joint State Cartage Committee.

(c) Where a Joint State Cartage Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint Area Cartage Committee. Such a decision will be final and binding on both parties.

(d) Where a Joint State Cartage Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the Joint Area Cartage Committee at the next regularly constituted session, unless the parties mutually agree to umpire handling. Matters pertaining to interpretation are not subject to umpire handling at this level.

(e) It is agreed that all matters pertaining to the interpretation of any provisions of this contract shall be referred, at the request of any party at any time, for final decision to the Joint Area Cartage Committee after first being processed by the Joint State Cartage Committee.

(f) Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Cartage Committee determine to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse.

(g) Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure [fol. 11] at any stage, or failure to comply with any final decision, withdraws the benefits of ARTICLE VIII.

* * * * * * *

ARTICLE XXII.

Vacations.

Section 1. Employees who have worked sixty per cent (60%) or more of the total working days during any twelve (12) month period shall receive vacations and vacation pay as follows:

One year employment	one (1) week
Three years or more	two (2) weeks
Twelve years or more	three (3) weeks
Twenty years or more	four (4) weeks

(commencing Jan. 1, 1956)

Vacation pay shall be computed by multiplying the number of hours in the guaranteed work week by the then prevailing straight time hourly rate at time of vacation. Compensation for the 4th week of vacation only, shall be computed at forty (40) times the then prevailing straight time hourly rate.

Section 2. During the first year of employment the employee must work sixty per cent (60%) of the total working days in order to obtain his vacation and must have been employed for the full year. During the second and subsequent years, the man must have worked sixty per cent (60%) of the total working days of the year, but need not be employed for the full year to be eligible for the vacation. No more than one vacation will be earned in any 12-month period.

Section 3. All vacations earned must be taken by employees and no employee shall be entitled to vacation pay [fol. 12] in lieu of vacation except, however, any employee who has quit, been discharged, or laid off before he has worked his 60%, shall be entitled to the vacation pay earned on a pro rata basis provided he has worked his first full year; and further provided that at the option of the employer the employee shall either take the fourth week of vacation or shall take only three (3) weeks and receive compensation for the fourth week of vacation.

Section 4. The vacation period of each qualified employee shall be set with due regard to the desire, seniority, and preference of the employees, consistent with the efficient operation of the Employer's business.

Section 5. Employee, upon the giving of a reasonable notice of not less than one (1) week to his Employer, shall be given his vacation pay before starting his earned vacation.

ARTICLE XXIII.

Holidays.

Section 1. Regular employees shall not be required to work and shall be paid eight (8) hours' pay at the straight time hourly rate for the following six (6) holidays: New Year's Day, Labor Day, Memorial Day, Thanksgiving Day, Fourth of July, and Christmas Day, even when not worked, and regardless of the day of the week on which it falls, provided they comply with the qualifications set forth hereinafter.

Section 2. Regular employees called to work on any of the above-listed holidays shall be paid a minimum of six (6) hours' pay at two (2) times the regular rate in addition to the eight (8) hours referred to above.

Section 3. In the event a holiday falls within an employee's vacation period, he shall be granted an additional day's vacation with pay.

[fol. 13] Section 4. In order to qualify for eight (8) hours of straight-time pay for a holiday not worked, it is provided that regular employees must work the regular scheduled work-day which immediately precedes or follows the holiday, except in cases of proven illness or unless the absence is mutually agreed to.

Section 5. Employees who are serving their thirty (30) day probationary period are not entitled to holiday pay for holidays falling within the probationary period.

Section 6. Regular employees are entitled to holiday pay if the holiday falls within the first thirty (30) days of

absence due to illness, non-occupational injury, or within the first six months of absence due to occupational injury, or during period of permissible absence. This does not apply to employees taking leave of absence for full time employment with the Union.

Section 7. If any holiday falls within the 30-day period following an employee's lay-off due to lack of work, and such employee is also recalled to work during the same 30-day period but did not receive any holiday pay, then in such case he shall receive an extra day's pay for each holiday, in the week in which he returns to work. Said extra day's pay shall be equivalent to eight (8) hours at the straight-time hourly rate specified in the contract. An employee who was laid off because of lack of work and is not recalled to work within the aforementioned 30-day period is not entitled to the extra pay upon his return. Under no circumstances shall the extra pay referred to herein be construed to be holiday pay, nor shall it be considered as hours worked for weekly overtime.

[fol. 14]

ARTICLE XXIV.

Health and Welfare Benefits.

The Employer shall contribute to the Central States, Southeast and Southwest Areas Health and Welfare Fund, which is to be administered jointly by the parties, the sum of Two Dollars and Fifty Cents ($2.50) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more.

Employers presently making payments to the Central States, Southeast and Southwest Areas Health and Welfare Fund, and employers who may subsequently begin to make payments to such fund, shall continue to make such payments for the life of this Agreement.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter in to appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken

or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than six (6) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

[fol. 15] There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Health and Welfare Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-driver compensation.

Contributions to the Health and Welfare Fund must be made for each week on each regular or extra employee even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other Health and Welfare Fund.

Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph.

ARTICLE XXV.

Pensions.

Effective February 1, 1958, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND the sum of Three Dollars ($3.00) per week for each employee covered by this Agreement who has been on the pay roll thirty (30) days or more. Effective February 1, 1960, the weekly contribution shall be increased to Four Dollars ($4.00) per week.

This Fund shall be the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. There shall be no other pension fund under this contract for operations under this contract or for operations under the Southeast and Southwest Areas contracts to which Employers who are party to this contract are also parties.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties [fol. 16] hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than six (6) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate for more, and regardless of the manner of computation of owner-driver compensation.

Contributions to the Pension Fund must be made for each week on each regular or extra employee, even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other pension Fund. Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph.

. . . . . .

[fol. 16a]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION #89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON and ELVIN PEAY, Plaintiffs-Appellants,

versus

RISS AND COMPANY, INC., Defendant-Appellee.

Appeal From the United States District Court for the Western District of Kentucky, at Louisville, Kentucky, Henry L. Brooks, Judge.

Appendix for Defendant-Appellee

[fol. 17]

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3985

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON, and ELVIN PEAY, Plaintiffs,

v.

RISS AND COMPANY, INC., Defendant.

ANSWER AND COUNTERCLAIM—Filed July 21, 1960

Answer.

For its answer to plaintiffs' complaint, defendant, Riss and Company, Inc., states as follows:

First Defense.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense.

There is another action pending between the parties to this suit filed by the defendant in the Jefferson County, Kentucky, Circuit Court, Chancery Branch, First Division, Action No. 47351, captioned "Riss and Company, Inc. v. General Drivers, Warehousemen and Helpers, Union #89, et al.", said suit being filed on January 28, 1960, and in which each and all of the plaintiffs in instant action are duly before the court and have filed responsive pleadings [fol. 18] thereto and in which a restraining order was entered on the same date; that said action arose out of the same circumstances and involves the same issues; that jurisdiction has already been assumed and a final determination has not been had in the aforesaid state court action and that no petition for removal to the United States District Court was asked for or granted within the statutory period and the plaintiffs are now estopped from bringing this action.

Third Defense.

Defendant admits the allegations stated in numerical paragraphs numbers 1 and 3(a), (b) and (c) of the complaint; denies numerical paragraph number 4 in that jurisdiction of this controversy is now with the Jefferson Circuit Court and that no petition for removal to the United States District Court was filed within the statutory period, and denies each and every allegation stated in the remaining numerical paragraphs to the extent and degree set forth in the counterclaim herein.

Fourth Defense.

If the work stoppages in question were authorized by Local 89, the contract was terminated as of January 25, 1960, because it failed to use all possible means, or any means, of a settlement pursuant to the first paragraph of

Article VIII of the contract. The defendant pleads in the alternative as a further defense that if the said actions comprising a work stoppage, tie-up and strike were unauthorized, then the provisions of Section 2 of Article VIII would be applicable and that neither of the plaintiffs is entitled to any relief whatsoever as there was no obligation upon the defendant to take back the employees after abandoning their posts of employment.

[fol. 19] Fifth Defense.

The grievance procedure outlined in paragraph 8 of the complaint was moot and a sham proceeding in that the contract was breached by the actions of the plaintiffs on January 25, 1960.

Wherefore, the defendant demands that the complaint be dismissed, held for naught and for its costs, as well as any and all other relief to which it may be entitled.

Counterclaim.

Count 1.

Without waiving its defenses outlined hereinabove, but still relying thereon, the defendant, for its counterclaim against the plaintiffs, and each of them, states as follows:

A. The defendant, Riss and Company, Inc., is a Delaware corporation engaged in the general trucking business as a common carrier and has a terminal location at 3433 South Seventh Street Road, Louisville, Kentucky.

B. The plaintiff, General Drivers, Warehousemen and Helpers, Union #89, is an unincorporated labor organization with a membership of hundreds of persons and is an autonomous body which elects its officers and representatives, which officers and representatives act for and represent the entire Union membership, said plaintiff having its headquarters at 3813 Taylor Boulevard, Louisville, Kentucky.

C. Plaintiffs, Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay are former employees of the defendant who abandoned their

posts of employment on or subsequent to January 15, 1960, at the terminal headquarters of the defendant in Louisville, Kentucky. Each of said plaintiffs is a member of the aforesaid Local Union #89 and plaintiff, Elvin Peay, is a steward thereof.

[fol. 20] D. The contract filed as Exhibit "A" in the complaint was entered into between the defendant and Local 89 and was in full force and effect until January 25, 1960, when it was breached and terminated by the actions of the plaintiffs as outlined hereinbelow.

E. Prior to January 25, 1960, Local 107 of the same Union, located at Philadelphia, Pennsylvania, with the same type of contract as Exhibit "A", arbitrarily breached said contract with the defendant and created a tie-up, went on strike and created a work stoppage without first using any means whatsoever for settlement, all contrary to the said written contract; that members of Local 107, which has the same international president and identical international constitution and rules and regulations as Local 89, caused to, and did, send numerous of its members to the Louisville terminal of this defendant, arriving during the work day of January 25, 1960, and commenced carrying and displaying conspicuously strike signs with reference to this defendant.

F. Without any notice whatsoever, the aforesaid six individual plaintiffs left and abandoned their posts of employment at the said time and place, and plaintiff, Elvin Peay, steward, and John West, Business Agent of Local 89, informed this defendant that Local 89 was on strike against this defendant and that it was an authorized one.

G. Said actions of the Union were contrary to the following provision of Article VIII of the contract in question:

> "The Unions and the Employers agree that there shall be *no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement*, as provided for in this Agreement, of any controversy which might arise." (Emphasis ours.)

[fol. 21] That despite said provision the Union, its officers, agents, representatives and members made no attempt whatsoever to use any means of discussion or settlement, thereby breaching and terminating said contract at that time and place.

H. The six individual plaintiffs left their posts of employment, went to the outer entrance of the defendant's terminal and proceeded to, and did, march back and forth near said entrance carrying signs "Local 89 on Strike" and "Riss-Strike", and physically threatened customers, invitees and other employees of the defendant who were seeking to enter and depart from the said terminal; as a result thereof, the plaintiffs, and each of them, acting in concert with each other, did strike, committed a tie-up and work stoppage and continued for a period of several weeks, all contrary to the written contract and without any attempt to invoke the grievance procedure.

I. That the aforesaid actions unlawfully interfered with the defendant's business and unlawfully coerced business customers to refrain from doing business with this defendant and that on March 3, 1960, in Civil Action No. 3927, United States District Court, Western District of Kentucky, in the case captioned "John C. Getreu, et al., vs. General Drivers, Warehousemen and Helpers Union, Local 89, et al.", this Court entered a temporary injunction restraining the said Union from unlawfully interfering with the business of the defendant after a finding that it had done so and that it was guilty of unfair labor practices; that said activities continued by each of these plaintiffs for a period of many days and that the defendant was damaged to the extent of $50,000.00.

J. To the best knowledge, information and belief of the defendant, and it so alleges, each of the six individual plaintiffs have been employed continuously since February [fol. 22] 16, 1960, and are not employees as alleged in numerical paragraph 2 of the complaint and that the Union continued, either directly or indirectly, in breach of the written contract, to interfere with the natural flow of the defendant's business and continued to do so for a long

period of time, all to the detriment and damage of the defendant.

Count II.

For Count II of its counterclaim against the plaintiffs, and each of them, the defendant states as follows:

In the alternative, if the aforesaid actions comprising a tie-up, strike and work stoppage were not authorized by Local 89, then Section 2, Article VIII of the said contract would be applicable and the six individual plaintiffs would be liable, individually and severally, for the damages complained of hereinabove and they would be estopped from claiming any relief whatsoever as the defendant is empowered to make other arrangments for handling its business, which it did, on or about February 1, 1960, by separate agreement with an independent contractor and the defendant asserts all of the provisions of aforesaid Section 2 as if copied in its entirety herein.

Wherefore, the defendant, Riss and Company, Inc., demands:

(1) A judgment, jointly and severally, against the plaintiffs, and each of them, in the total amount of $50,000.00, if it be found that the activities complained of were authorized.

(2) In the alternative, if it be found that the activities were unauthorized, then said judgment shall be jointly and severally against the six individual plaintiffs hereinabove named.

[fol. 23] (3) For its costs herein expended and for any and all other relief to which it may appear to be entitled.

H. Bemis Lawrence, 1129 Kentucky Home Life Building, Louisville, Kentucky, Attorney for Defendant.

Certificate.

I hereby certify that a copy of the foregoing Answer and Counterclaim was this ..... day of July, 1960, mailed to Hardy and Logan, Attorneys for Plaintiffs, 506, West Jefferson Street, Louisville 2, Kentucky.

/s/ Bemis Lawrence.

[fol. 24]

In the United States District Court

Amended and Supplemental Answer and Counterclaim

Comes the defendant and with leave of Court files its Amended and Supplemental Answer and Counterclaim without relinquishing its previous defenses, but still relying thereon, and states as follows:

1. The captioned action is on the Fall, 1960, docket and is set for pretrial conference on September 8, 1960. The issues have been joined.

2. Notwithstanding, the plaintiffs instituted a strike and commenced picketing at the terminal of the defendant located at 3433 South Seventh Street Road, Louisville, Jefferson County, Kentucky, at 8:00 A.M. on Tuesday, August 23, 1960; that the announced and admitted purpose of the said strike and picket line results from the same and identical issues involved in the within action and pertains to the same parties and factual situation. The individual plaintiffs abandoned their posts of employment with the defendant on January 25, 1960, and have not been employed by the defendant since that date and are not now employed. The plaintiffs, and each of them, have acted in concert with each other for the purpose of causing the said picketing and striking.

3. The plaintiffs elected to file this civil action involving the facts at hand in this Court and the sole purpose of the said picketing and striking is to exert pressure and influence upon the defendant in the compromising and culminating of this action; that said picketing and striking are arbitrary, capricious and extremely injurious to the

business of the defendant; that immediate and irreparable injury, loss and damage will result to the defendant and to its customers before notice can be served and a hearing had thereon; that the actions of the plaintiffs are in violation of the rights of this defendant and that it is entitled to [fol. 25] immediate relief in the form of a temporary restraining order and made permanent at a later date; that injunctions have been asked for, and have been granted in modified form, by the defendant against the plaintiffs, or a portion of them, in the past, in the Jefferson County, Kentucky, Circuit Court. This Court has assumed jurisdiction of the facts involved in this case and said Court has jurisdiction to issue the restraining order requested by virtue thereof and the plaintiffs are estopped from striking and picketing because of their said election in filing this action and that said controversy will be decided by this Court.

4. As a result of the foregoing, the business of the defendant has been seriously hampered and curtailed, customers are being lost and its operations in Louisville, Kentucky and elsewhere in the United States are being adversely affected with the resultant increase of cost to the defendant in the conduct of its business; that as a result of the actions of the plaintiffs as outlined in detail in the original Answer and Counterclaim the said picketing and striking are contrary to the original contract between the parties and consequently the picketing and striking now being engaged in are without foundation, willful and malicious and for the single purpose of doing harm and injury to the defendant; that each day in which said unlawful action of the plaintiffs continue, defendant is suffering and will continue to suffer additional damages of $10,000.00 each day the picketing and striking last.

Wherefore, the defendant demands, in addition as in its original Answer and Counterclaim, as follows: (1) A temporary restraining order enjoining the plaintiffs, and each of them, and the membership of the plaintiff Local 89 from striking, picketing, molesting, harassing or interfering with the business of the defendant in any way, shape,

form or fashion. (2) For additional damages in the amount [fol. 26] of $10,000.00 each and every day that said striking and picketing continues and that said judgment be jointly and severally against the plaintiffs, and each of them. (3) For its costs herein expended and any and all other relief to which it may appear to be entitled.

H. Bemis Lawrence, 1129 Kentucky Home Life Building, Louisville, Kentucky, Attorney for Defendant.

I, Joseph O. Mathes, Terminal Manager of Riss & Company, Inc., Louisville, Kentucky, being duly sworn, state that I have read carefully the allegations contained in the foregoing Amended and Supplemental Answer and Counterclaim and that they are true.

Joseph O. Mathes.

State of Kentucky,
County of Jefferson, ss.:

I, H. Bemis Lawrence, a notary public in and for the aforesaid county and state, hereby certify that the foregoing instrument was this day, in said county and state, subscribed, acknowledged and sworn to before me by Joseph O. Mathes.

Witness my hand this 29th day of August, 1960.

My commission expires December 5, 1963.

.....
Notary Public, Jefferson County, Kentucky.

[fol. 27]

EXHIBIT "A" OF COMPLAINT

Central States
Area

LOCAL CARTAGE AGREEMENT

Covering Employees
of Private, Common,
Contract and Local
Cartage Carriers

for the period of
February 1, 1958, to January 31, 1961

ARTICLE VIII, Subsection (h) of Section 1:

(h) In the event of strikes or work stoppages or other activities which are permitted in case of deadlock, default, or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement unless otherwise agreed to. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this agreement.

Section 2:

It is further mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agree-
[fol. 28] ment, serve upon the Company a written notice, which notice will list the Union's authorized representatives who will deal with the Company, make commitments for the Union generally, and in particular have the sole authority

to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. It is further agreed that in all cases of an unauthorized strike, slowdown, walk-out, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members. While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Company during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any recourse to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Company shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slowdown, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. It is further agreed and understood that the Central States Drivers Council shall not be liable for any strike, breach, or default in violation of this Agreement, unless the act is expressly authorized by its Executive Board. A properly designated officer of the Central States Drivers Council shall, within twenty-four (24) hours after request is made to the Secretary of the Central States Drivers Council, declare and advise the party making such request, by telegram, whether [fol. 29] the Council has authorized any strike or stoppage of work. The Central States Drivers Council shall make immediate effort to terminate any strike or stoppage of work which is not authorized by it without assuming liability therefor.

It is understood and agreed that failure of the Central States Drivers Council to authorize a strike by a Local Union shall not relieve such Local Union of liability for a strike authorized by it and which is in violation of this Agreement.

[fol. 30]

Before: Martin and Cecil, Circuit Judges, Darr, District Judge.

CAUSE ARGUED AND SUBMITTED—December 9, 1961

This cause is argued by Ralph H. Logan for plaintiffs-appellants and by H. Bemis Lawrence for defendant-appellee and is submitted to the court.

[fol. 31]

Appeal from the United States District Court for the Western District of Kentucky.

JUDGMENT—January 31, 1962

This Cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for Entry: Lester L. Cecil, U.S. Circuit Judge.

[fol. 32]

No. 14534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal from the United States District Court for the Western District of Kentucky, at Louisville, Kentucky.

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON and ELVIN PEAY, Plaintiffs-Appellants,

v.

RISS AND COMPANY, INC., Defendant-Appellee.

OPINION—January 31, 1962

Before: Martin and Cecil, Circuit Judges, and Darr, Senior District Judge.

CECIL, Circuit Judge. This is an appeal from an order of the United States District Court for the Western District of Kentucky dismissing the complaint of the plaintiffs-appellants for want of jurisdiction in the court to hear and determine the issues presented by the complaint.

It appears from the record in the trial court that the question of jurisdiction was considered by the trial judge at a pretrial conference, at which counsel for all parties were present. From the record no evidence was taken and there was no stipulation of facts. The order of dismissal was made upon defendant-appellee's motion at the conference.

[fol. 33] The question now before this Court is whether it is apparent from the face of the complaint that it did not state a cause of action or that the trial court lacked jurisdiction to determine the questions presented by it.

The plaintiffs in the action are General Drivers, Warehousemen and Helpers, Local Union No. 89, and six individuals alleged to be employees of the defendant company.

The defendant is a Delaware corporation engaged in the interstate transportation of freight by motor vehicle, as a common carrier, and maintains a freight terminal at Louisville, Kentucky. The action involves a contract between the plaintiff union and the defendant. Jurisdiction is claimed under section 301 of the National Labor Relations Act. (29 U.S.C. 185) A copy of the contract is attached to the complaint and made a part of it.

Article VII of the contract provides for a Joint Local Area Committee, a Joint State Cartage Committee and a Joint Area Cartage Committee whose functions are to settle disputes that cannot be settled between the Employer and the Local Union. Article VIII prescribes grievance procedure. The parties agree that there shall be no strikes, lockouts, tie-ups, etc., without first using all possible means of settlement. Disputes are first to be taken up with the employer and union and then to be processed through the above named committees. Subdivision (g) provides, " . . . failure to comply with any final decision, withdraws the benefits of Article VIII."

It is alleged in the complaint that the grievances of the individual plaintiffs were processed through the machinery provided for in Article VIII and that the Joint Area Cartage Committee ordered the defendant to reinstate them with their seniority and pay them lost wages. It is further alleged that the defendant refused to carry out this order.

The procedure described in Article VIII is a grievance procedure. It is not an agreement for compulsory arbitration, in exchange for a no-strike or work stoppage clause. There is no finality to this grievance procedure. The facts of this case do not bring it under the principle of *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448. The order of the Joint Area Cartage Committee was not an arbitration award which could be entered by the courts as was the case in *A. L. Kornman Co.* v. *Amalgamated Clothing Workers*, 264 F. 2d 733, C.A. 6, cert. denied, 361 U.S. 819. Recent pronouncements of the [fol. 34] Supreme Court with reference to arbitration are not controlling here. See *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 and *United*

Steelworkers of America v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574.

It is alleged in the complaint inter alia that, on or about January 25, 1960, pickets were placed at the defendant's place of business in Louisville, by a labor union of Philadelphia, Pennsylvania; that a labor dispute existed in Philadelphia between the Philadelphia union and the defendant; that the individual plaintiffs herein "chose to respect and did respect the picket line of said Philadelphia labor union"; that on February 15, 1960, the named plaintiffs reported for work and the defendant refused to let them resume work.

The plaintiffs seek reinstatement of the individual plaintiffs with seniority and lost pay from February 15, 1960.

The defendant claims that the individual plaintiffs violated the contract by leaving their jobs on January 25th. The plaintiffs point to a provision of Article IX of the contract which reads as follows: "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union or refuse to handle unfair goods." This clause must be read with another clause of this Article. "The insistence by any Employer that his employee . . . go through a picket line after they have elected not to, *and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council*, shall be sufficient cause for an immediate strike of all such Employer's operations without any needs of the Union to go through the grievance procedure herein." (Emphasis added) There is no allegation in the complaint that the refusal to go through picket lines was given such approval.

It is our opinion that the complaint does not contain facts which would show that the plaintiffs were warranted under the contract to leave their jobs on January 25th.

Finally, it appears that the purpose of the action is to recover for the individual plaintiffs' lost wages together with incidental benefits to the Union based on the payment of wages to employees. This we think brings the facts of this case within the ambit of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437.

[fol. 35] As was said in that case, p. 461, "Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one." See also *Communications Workers of America, AFL-CIO* v. *The Ohio Bell Telephone Co.*, 169 F. Supp. 822, affirmed 265 F. 2d 221, C.A. 6, cert. denied 361 U.S. 814.

The trial judge was right in dismissing the complaint and for the reasons stated herein the judgment of the District Court is affirmed.

[fol. 36]

ORDER DENYING PETITION FOR REHEARING—March 21, 1962

Upon consideration of the petition for rehearing, it is hereby denied.

Lester L. Cecil, Circuit Judge.

[fol. 37] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 38]

SUPREME COURT OF THE UNITED STATES

No. 180—October Term, 1962

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, et al., Petitioners,

vs.

RISS AND COMPANY, INC.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration and decision of this petition.

Office Supreme Court, U.S.
FILED
JUN 13 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 180

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON AND ELVIN PEAY, Petitioners

v.

RISS AND COMPANY, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON AND ELVIN PEAY, Petitioners

v.

RISS AND COMPANY, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on January 31, 1962.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 298 F2d 341, and is attached hereto, together with the judgment and the order denying the petition for rehearing, as Appendix "A". The Order of the United States District Court for the Western District of Kentucky, granting respondent's motion to dismiss the complaint, is unreported and is attached hereto as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1962, and a Petition for Rehearing was denied on March 21, 1962, making such judgment final.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal district courts have jurisdiction, under § 301 of the Labor-Management Relations Act, of an action brought by a labor organization against an employer to enforce an award rendered by a bipartisan grievance committee pursuant to a collective bargaining agreement between the foregoing parties, whereby the said committee is constituted as the last step in the grievance procedure and its decisions are designated as "final".

2. Whether the federal district courts are deprived of jurisdiction to enforce the award, as aforesaid, on the sole ground that the tangible benefit of said award accrues to individual employees who are represented by the plaintiff-labor organization.

3. Whether, in the foregoing context, a federal court of appeals exceeds the bounds of the permissible scope of review by making a decision on the merits of the grievance contrary to that of the grievance committee and, in so doing, resolving disputed facts without the benefit of evidence or argument by the parties.

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Sec. 185, provides as follows:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter,

or between any such labor organizations, may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties."

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT

A. The Facts

Petitioner, General Drivers, Warehousemen and Helpers, Local Union No. 89 (hereinafter called Local 89), is a labor organization affiliated with the International Brotherhood of Teamsters, having its principal office in Louisville, Kentucky. The individual petitioners are members of said Local 89 and employees of respondent Riss and Company, Inc. (R., App. 2a).[1]

The respondent, Riss and Company, Inc. (hereinafter called Riss), is a Delaware corporation engaged in the interstate transportation of freight by motor vehicle, maintaining a freight terminal in Louisville, Kentucky. (R., App. 3a).

At all times material herein, there was in full force and effect a collective bargaining agreement between Local 89

[1] The designation "(R., App.)" has reference to the Appendix for Plaintiffs-Appellants as it appears in the certified record.

and Riss, governing the wages, hours and working conditions of the employees of Riss at the Louisville terminal. (R., App. 3a). Article VIII, Section 1 of said agreement provides that "there shall be no strike, lockout, tie-up, or legal proceedings" as to any controversy without prior resort to the grievance machinery of the agreement. Under Articles VII and VIII, the grievance procedure consists of several "steps," the last one being resort to a Joint Area Cartage Committee—comprised of an equal number of employer and union representatives—"for final decision." (R., App. 9a). Article IX of the agreement protects the employees against discharge for failure to cross a picket line. (R., App. 4a).

On or about January 25, 1960, during the course of a labor dispute between Riss and Teamsters Local 107 of Philadelphia, Pennsylvania, Local 107 placed pickets at the Riss terminal in Louisville. The six individual petitioners herein, employees of Riss at Louisville, chose to respect and did respect the said picket line. On February 15, 1960, the six employees reported for work, and Riss refused to permit them to return to work. Thereupon, they filed grievances against Riss, seeking reinstatement and back pay, pursuant to the aforementioned provisions of the collective bargaining agreement. (R., App. 3a, 4a).

The grievances were processed through the various steps of the grievance procedure, with full participation by both parties at each and every step. At the terminal point of that process, the Joint Area Cartage Committee rendered a decision and award, directing that the six individuals be reinstated with back pay. However, Riss refused and continues to refuse to abide by that decision. (R., App. 4a).

B. The Proceedings Below

Petitioners thereupon brought suit against Riss to enforce the award in the United States District Court for

the Western District of Kentucky, invoking the jurisdiction of that court under § 301 of the Labor-Management Relations Act (29 U.S.C. 185). At a pre-trial conference held on February 2, 1961, and upon the motion of Riss to dismiss, the court sustained the motion and ordered the complaint dismissed for lack of jurisdiction on the authority of *Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437 (1955). (App. "B").

Upon appeal to the United States Court of Appeals for the Sixth Circuit, that court affirmed the Order of the district court on three grounds:

First, the order of the Joint Area Cartage Committee was not "an arbitration award" that could be enforced by the courts and, therefore, "recent pronouncements of the Supreme Court with reference to arbitration are not controlling here;"

Second, upon that court's construction of the contract, the complaint did not state a cause of action;

Third, since "the purpose of the action is to recover for the individual plaintiffs lost wages together with incidental benefits to the Union based on the payment of wages to employees," the court is deprived of jurisdiction by *Westinghouse, supra.* (App. "A").

A Petition for Rehearing was denied on March 21, 1962. (App. "A").[2]

REASONS FOR GRANTING THE WRIT

I

INTRODUCTION

The court below has decided important and substantial federal questions concerning the scope and application

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[2] Each and every one of the Supreme Court cases cited hereafter was brought to the attention of the court below in the petitioners' brief and/or petition for rehearing.

of Section 301, in a manner inconsistant with decisions of this Court and with Congressional policy. Its holding that the decision of the Joint Area Grievance Committee was not an "arbitration award" and therefore unenforceable under § 301 has the effect of limiting the application and protection of that Section to grievance procedures which fit that court's conception of "arbitration." This result was hardly foreseen by Congress when it granted jurisdiction to the Federal Courts to enforce "contracts" between management and labor, according to their terms, and regardless of whether the terms related to a grievance procedure, arbitration, or a substantive matter. Recent decisions of this Court made it clear that the doors of the Federal Courts were to be opened for the enforcement of agreements between the parties pertaining to the settlement of their grievances, regardless of what those grievance procedures were called. *Retail Clerks v. Lion Dry Goods, Inc.*, 49 LRRM 2670 (1962). Moreover, the limitation which the court below placed upon § 301 would in effect upset a large number of collective bargaining agreements which contain grievance procedures not culminating in decision by a neutral umpire and which have permitted the peaceful and amicable settlement of disputes between labor and management for many years.

The same effects are produced by the holding of the court below that § 301 is inapplicable where the purpose of the particular grievance, processed through the grievance procedure pursuant to the agreement of the parties, is to restore to individual employees that which they had lost by the employer's breach of the contract. Thus, according to that court, the very basic promise of the employer to abide by decisions of the grievance machinery—which promise underlies the power and right of the Union to administer the entire contract—is unenforceable in the courts. This holding, too, fails to recognize the important

decisions of this Court in the § 301 area. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

Finally, the court below decided the grievance on its merits, upon its own construction of the contract, without the benefit of evidence or argument on the issue. In so doing, the court not only departed from the accepted and usual course of judicial proceedings but disregarded the clearly established standards of review announced by this Court in the 1960 *Steelworkers* cases, *supra*.

As elaborated below, the importance of this decision to the administration of § 301, harmony in the field of labor management relations, adherence to the mandate of this Court, and the proper division of function between the grievance machinery established by the parties and the federal courts, justifies the granting of this petition.

II

THE DECISION OF THE COURT BELOW THAT THE AWARD OF THE JOINT AREA CARTAGE COMMITTEE IS NOT AN "ARBITRATION AWARD" AND THEREFORE UNENFORCEABLE UNDER § 301 IS INCONSISTENT WITH DECISIONS OF THIS COURT AND WITH THE PLAIN MEANING OF THE STATUTE.

The parties in the instant case have chosen a method for settling their grievances whereby bipartisan committees determine controversies importantly affecting the employment relationship. Resort to these committees is com-

pulsory and their decisions are final and binding.[3] In case of deadlock, the dispute may be submitted to an umpire upon a majority vote of the appropriate committee. But here there was no such deadlock. The Joint Area Cartage Committee, composed of representatives equally chosen by the employer and the union, decided the dispute in favor of the union with full participation by both parties.

If that which is to be enforced under § 301 must be "arbitration" or an "arbitration award", as intimated by the court below, the foregoing procedure fully qualifies.[4] Moreover, if the decision below is intended to require resort to an *outside umpire* as a prerequisite to § 301 jurisdiction, it seriously undermines the force of logic and the policies underlying that Section. For there is nothing in the Agreement, or in practice, which suggests that the method chosen by the parties is less capable of maintaining labor peace between them than the process envisioned by that court. If anything, the parties would have greater confidence in their own representatives' personal judgment and knowl-

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[3] The contrary "fact finding" of the Court below contradicts the express terms of the agreement. Article VIII, Section 1 of the contract provides that disputes "shall" be taken through the grievance procedure. That same Section forbids resort to a strike or legal proceedings "without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise". Finally, Article VIII, Section 1(e) provides that matters pertaining to the interpretation of the contract "shall" be referred "for final decision" to the Joint Area Cartage Committee. In any event, this question should have been decided by the district court, on the basis of record evidence, rather than by the court below.

[4] "ARBITRATION. The submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement." Black's Law Dictionary, 4th ed., p. 134 (West Publishing Co. 1957).

edge of the common law of the shop than in the knowledge and judgment of an outside arbitrator.[5]

In any event, the decisions of this Court, including their many references to legislative history, as well as the plain meaning of § 301, demonstrate most emphatically that the federal courts may and should enforce awards rendered pursuant to the grievance machinery or other methods of settlement agreed upon by the parties—regardless of what the methods so chosen may be called. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). Thus, in *Lincoln Mills* the Court pointed to a House Report on § 301 which, so far as relevant here, stated: "When parties have agreed on *a procedure* for settling their differences, and the agreement is in effect, they will be required to follow the procedure . . . Most agreements provide procedures for settling grievances, *generally* including some form of arbitration as the last step." H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 21 (emphasis supplied). In the same opinion, Justice Douglas stated that the Norris-LaGuardia Act does not preclude enforcement of arbitration agreements because that Act

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[5] It is significant that in *Denver-Chicago Trucking Co.*, 132 NLRB No. 123, 48 LRRM 1524 (1961), the NLRB honored a decision of the Joint State Cartage Committee, which is a part of the grievance procedure of the contract presently before us, to the same extent that it had previously honored decisions of arbitrators. Speaking of the instant contract, the Board said: "We note that the grievance procedure had been followed by the parties for 18 years and that it presumably satisfied both the employers and the unions as serving its purpose . . . We do not agree with the Trial Examiner that it is essential that a public member sit on grievance panels . . ." (48 LRRM at 1526 and fn. 6).

indicates "a congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by *negotiation, mediation, or 'voluntary arbitration'*." (353 U.S. at 458) (emphasis supplied). In *American Mfg. Co.*, addressing itself to the Sixth Circuit, the Court stated:

> "Section 203(d) of the Labor Management Relations Act, 1947, 61 State (sic) 154, 29 U.S.C. 173(d), states, 'Final adjustment *by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . .' *That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.*" (363 U.S. at 566) (emphasis supplied).

Finally, in the very recent decision of *Retail Clerks v. Lion Dry Goods, Inc.*, 49 LRRM 2670 (1962), this Court reversed the opinion of the Sixth Circuit that a "Statement of Understanding" between the parties was not enforceable under § 301. On that occasion, it was the view of the court below that § 301 applied solely to "collective bargaining agreements." In disagreement with that view, this Court stated the following:

> "The words of § 301(a) require no such narrow construction as is suggested; rather, they negate it . . . The section says 'contracts' . . . If this kind of strike settlement were not enforceable under § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult . . . It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms

> affect the working conditions of the employees of both respondents . . . It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within § 301(a)." (49 LRRM at 2673-2674).

The lesson is clear, for the Section indeed says "contracts." Suffice it to say that the method of settling disputes in question here constitutes the agreement of the parties—it is their contract. And it has achieved, and continues to achieve, the same worthy objectives outlined by the Court in *Lion Dry Goods*. "Plainly it falls within § 301(a)."

Despite the above, the Sixth Circuit has again attempted to narrow the application of § 301. Thus, the parties are now told by that court that the satisfactory grievance procedure contained in their agreements—a procedure that has permitted an amicable relationship for 18 years or more—is no longer a "contract" between them and is unenforceable under § 301. The effect of the decision upon labor management relations is certain to be adverse. Many collective bargaining agreements across the nation contain similar methods for the settlement of disputes. Whether the reason for the employment of these particular procedures be the parties' jealousy of their sovereignty, greater confidence in their own representatives; the great expense of submission to an outside arbitrator, or a belief that the settlement of disputes between the parties themselves breeds an atmosphere of greater cooperation, the parties thereto have proceeded on the assumption that they are enforceable as are any other contracts. In practical terms, the decision below would now coerce these persons into revising their agreements to provide for a procedure specially favored by the court below, on pain of being barred from the courthouse door. As to those agreements that are not so revised, the final steps in the grievance procedure would no longer be amicable private or judicial

settlement,[6] but interruptions in production, strikes, lockouts and general unrest and suspicion.

The importance of the federal question decided by the court below in terms of the administration of § 301, the adverse effect of the decision upon the field of labor-management relations, and its complete inconsistency with decisions of this Court and with the plain meaning of the statute, combine to recommend intervention by this Court.

III

THE COURT'S RELIANCE ON THE WESTINGHOUSE CASE IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

In light of the above, the court's reliance on the authority of *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, was equally misplaced.

The *Westinghouse* case did not, as does this one, involve the enforcement of a grievance procedure or a final award rendered pursuant thereto. It was simply an action brought by the union, to recover wages owing to individual employees—an action that could have been maintained by the employees themselves. To Justices Frankfurter, Burton and Minton, the action signalled "constitutional difficulties" and a "potential flood of grievances". The Chief Justice and Justice Clark viewed the claim as "uniquely personal" to the employees. Justice Reed stated that the claim arose

[6] Note that by providing, in Article VIII, that there shall be no "legal proceedings" without prior resort to the grievance procedure, the parties themselves contemplated that the decision produced by resort to that procedure could be legally enforced in the courts.

"from separate hiring contracts between the employer and each employee." Justices Douglas and Black dissented:

> "We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving the construction and enforcement of the collective bargaining agreement." (348 U.S. at 465, 466).[7]

Thus was drawn the distinction between uniquely personal rights arising out of individual hiring contracts, on the one hand, and rights and obligations "running to the union" on the other.

The distinction was clarified in later decisions of the Court. *Lincoln Mills*, for example, was a union action to enforce an agreement to arbitrate a grievance which, at the time of the decision, amounted to nothing more than back wages owing to individual employees. Justice Douglas, for the Court, distinguished *Westinghouse*:

> "The basic question concerned the standing of the union

[7] In line with the dissenting opinion in *Westinghouse*, both professors Cox and Gregory favor giving the union "control over all claims arising under the collective agreement". Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 24 (1958); Gregory, "The Law of the Collective Agreement," 57 Mich. L. Rev. 635, 642-643 (1959). Now that *Lincoln Mills, supra*, has disposed of the constitutional problems underlying much of *Westinghouse*, these views should appear much more acceptable to this Court. See also § 301 of Taft-Hartley ("Any such labor organization may sue or be sued as an entity and on behalf of the employees whom it represents in the courts of the United States."); and *cf., Charles Dowd Box Co. v. Courtney*, 49 LRRM 2619 (1962), wherein this Court—although not squarely faced with the application of *Westinghouse*—affirmed a decision of the Supreme Judicial Court of Massachusetts approving an award of back wages to employees, in a suit brought on their behalf under § 301, without the interposition of a grievance machinery.

to sue and recover on those individual employment contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it has made with the employer." (353 U.S. at 456, fn. 6).

In a concurring opinion, Justices Burton and Harlan wrote:

"The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union." (at 760).

Concurring in *American Mfg. Co., Warrior and Gulf Nav. Co.*, and *Enterprise Corp.*, where this Court ordered the enforcement of arbitration agreements and awards thereof pursuant to § 301, Justice Brennan—joined by Justices Harlan and Frankfurter—stated the issue as follows:

"The issue concerns the enforcement of but one promise—the promise to arbitrate in the context of an agreement dealing with a particular subject matter, the industrial relations between employers and employees . . . And I emphasize this, for the arbitration promise is itself a contract." (363 U.S. 569-570).

In the foregoing fashion, the Court has made it abundantly clear that union actions to enforce agreements to arbitrate and awards pursuant to such agreements are enforceable under § 301, despite the fact that "the purpose of the action is to recover for the individual plaintiffs lost wages". The union's participation in the instant proceedings is of that nature. It is attempting to enforce a promise made directly to the union—the promise to abide by awards rendered by a bipartisan committee at the final stage of the grievance procedure. It is a very basic promise—the only one in the contract that governs the administration and interpretation of each and every one of the remaining provisions of the contract. The sole primary parties to this contractual obligation are the employer and the union.

IV

THE COURT'S RELIANCE ON THE WESTINGHOUSE CASE IS INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT COURTS.

In applying *Westinghouse* in this context, the decision of the court below was inconsistent not only with the mandate of this Court, but with the decisions of other circuit courts as well. *Item Co. v. N.O. Newspaper Guild*, 256 F2d 855 (5th Cir. 1958), cert. den. 358 U.S. 867 (1958); *Textile Workers Union v. Cone Mills Corp.*, 268 F2d 920 (4th Cir. 1959), cert. den. 361 U.S. 886 (1959); *American Brake Shoe Co. v. Auto Workers Local 149*, 285 F2d 869 (7th Cir. 1961).[5]

This inconsistency can only be, and should be, resolved by this Court.

V

IN DECIDING THE GRIEVANCE ON ITS MERITS, THE COURT BELOW NOT ONLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BUT DISREGARDED THE CLEARLY ESTABLISHED STANDARDS OF RE-

[5] Conceivably, the court's reliance on *Westinghouse* might be dependent upon its earlier finding that the Committee's decision was not an "arbitration award" and therefore unenforceable. For in *A. L. Kornman Co. v. Amalgamated Clothing Workers*, 264 F2d 733 (6th Cir.), cert. den. 361 U.S. 819, that court apparently followed the "arbitration" decisions of this Court—albeit with a strong dissent by Judge Miller. However, the court's opinion in subsequent cases—including this one—leads us to believe that *Westinghouse* is being applied as a separate and independent ground for dismissal of the action. Cf., *Communications Workers v. The Ohio Bell Telephone Co.*, 160 F. Supp. 822, aff. 265 F2d 221 (6th Cir.), cert. den. 361 U.S. 847.

VIEW ANNOUNCED BY THIS COURT IN § 301 CASES.

A final ground for the conclusion of the court below was its decision, *on the merits*, that plaintiffs were not entitled to reinstatement and back pay. This decision is contrary to that of the Joint Area Cartage Committee, and plainly in conflict with the following provision of the contract:

> "It shall not be a violation of this Contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods." (Art. IX, R., App. 4a).

The court arrived at its conclusion by an independent interpretation of the contract. In particular, the court relied on a contract clause that provides a narrow exception to the "no strike" clause—having nothing to do with discharge—and concluded that it "must" be read together with the provision regulating the right to discharge. The result was the court's opinion "that the complaint does not contain facts which would show that the plaintiffs were warranted under the contract to leave their jobs on January 25th." In effect, the holding assumes certain facts that may be very much in dispute between the parties: first, that the foregoing clause dealing with the right to strike was intended by the parties to affect the right to discharge; second, that individual refusals to cross a picket line may be equated with a "strike," within the meaning of that section; third, that Local 89 was in fact engaged in such a "strike" at the time in question; and fourth, that the Union engaged in such "strike" without having gone through the grievance procedure. These crucial "fact findings" were made without the benefit of evidence or argument in the courts below. In fact, the only ground relied on by the District Court for dismissal of the complaint

was lack of jurisdiction. Nor was this construction of the contract suggested by the respondent in its brief or argument to the court below. Had petitioners been timely warned of the *matter of defense* now relied on by the court in respondent's behalf, they undoubtedly would have been in the position to submit evidence and argument on the point or to move to amend the complaint. But such opportunity was denied absolutely. In this respect, the court below, has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

In addition, said decision on the merits of the dispute that had already been decided by the committee, exceeds the bounds of the limited role of the courts in cases arising under § 301, as clearly defined by this Court. In *American Mfg. Co., supra*, the Court reversed a similar decision of the Sixth Circuit that a grievance of which arbitration was sought was frivolous and not subject to arbitration. During the course of the opinion, this Court took great pains to examine the relationship between the arbitrator and the judge in a § 301 context:

> "The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plan or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious . . . The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator . . . Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator . . . The courts, therefore, have no business weighing the merits of the grievance . . ." (363 U.S. at 567-568).

In *Enterprise Corp., supra*, the Court delineated the function of the courts upon review of an arbitration award already rendered:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." (363 U.S. at 596).
>
> ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (363 U.S. at 599).

But in this instance, too, the admonition of this Court went unheeded. The merits of the dispute were precisely that which the court below determined. Its own construction of the contract, as well as its final conclusion, differed from that of the Committee—whose construction and decision had been "bargained for" by the parties. Absent the benefit of evidence or argument, the court determined the issue. And it did so without so much as paying lip-service to the narrow standard of review promulgated by this Court in *Enterprise*—to wit, whether it is "apparent" that the decision of the Committee went beyond the submission. (363 U.S. at 598).

In view of the court's departure from the accepted and usual course of judicial proceedings and its disregard of the standards of review established by this Court, its decision should not be permitted to stand.

CONCLUSION

It is respectfully submitted that, for the reasons asserted

bove, this Petition for a Writ of Certiorari should be
ranted.

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APPENDIX A

NO. 14534

United States Court of Appeals

FOR THE SIXTH CIRCUIT

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON AND ELVIN PEAY,

Plaintiffs-Appellants,

v.

RISS AND COMPANY, INC.,

Defendant-Appellee.

} APPEAL from the United States District Court for the Western District of Kentucky, at Louisville, Kentucky.

Decided January 31, 1962.

Before: MARTIN and CECIL, Circuit Judges, and DARR, Senior District Judge.

CECIL, Circuit Judge. This is an appeal from an order of the United States District Court for the Western District of Kentucky dismissing the complaint of the plaintiffs-appellants for want of jurisdiction in the court to hear and determine the issues presented by the complaint.

It appears from the record in the trial court that the question of jurisdiction was considered by the trial judge at a pretrial conference, at which counsel for all parties were present. From the record no evidence was taken and

there was no stipulation of facts. The order of dismissal was made upon defendant-appellee's motion at the conference.

The question now before this Court is whether it is apparent from the face of the complaint that it did not state a cause of action or that the trial court lacked jurisdiction to determine the questions presented by it.

The plaintiffs in the action are General Drivers, Warehousemen and Helpers, Local Union No. 89, and six individuals alleged to be employees of the defendant company. The defendant is a Delaware corporation engaged in the interstate transportation of freight by motor vehicle, as a common carrier, and maintains a freight terminal at Louisville, Kentucky. The action involves a contract between the plaintiff union and the defendant. Jurisdiction is claimed under section 301 of the National Labor Relations Act. (29 U.S.C. 185) A copy of the contract is attached to the complaint and made a part of it.

Article VII of the contract provides for a Joint Local Area Committee, a Joint State Cartage Committee and a Joint Area Cartage Committee whose functions are to settle disputes that cannot be settled between the Employer and the Local Union. Article VIII prescribes grievance procedure. The parties agree that there shall be no strikes, lockouts, tie-ups, etc., without first using all possible means of settlement. Disputes are first to be taken up with the employer and union and then to be processed through the above named committees. Subdivision (g) provides. ". . . failure to comply with any final decision, withdraws the benefits of Article VIII."

It is alleged in the complaint that the grievances of the individual plaintiffs were processed through the machinery provided for in Article VIII and that the Joint Area Cartage Committee ordered the defendant to reinstate them

with their seniority and pay them lost wages. It is further alleged that the defendant refused to carry out this order.

The procedure described in Article VIII is a grievance procedure. It is not an agreement for compulsory arbitration, in exchange for a no-strike or work stoppage clause. There is no finality to this grievance procedure. The facts of this case do not bring it under the principle of *Textile Workers' Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448. The order of the Joint Area Cartage Committee was not an arbitration award which could be enforced by the courts as was the case in *A. L. Korgman Co.* v. *Amalgamated Clothing Workers*, 264 F 2d 733, C.A. 6, cert. denied, 361 U.S. 819. Recent pronouncements of the Supreme Court with reference to arbitration are not controlling here. See *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 and *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574.

It is alleged in the complaint inter alia that, on or about January 25, 1960, pickets were placed at the defendant's place of business in Louisville, by a labor union of Philadelphia, Pennsylvania; that a labor dispute existed in Philadelphia between the Philadelphia union and the defendant; that the individual plaintiffs herein "chose to respect and did respect the picket line of said Philadelphia labor union"; that on February 15, 1960, the named plaintiffs reported for work and the defendant refused to let them resume work.

The plaintiffs seek reinstatement of the individual plaintiffs with seniority and lost pay from February 15, 1960.

The defendant claims that the individual plaintiffs violated the contract by leaving their jobs on January 25th. The plaintiffs point to a provision of Article IX of the contract which reads as follows: "It shall not be a violation of this contract and it shall not be cause for discharge if

any employee or employees refuse to go through the picket line of a union or refuse to handle unfair goods." This clause must be read with another clause of this Article. "The insistence by any Employer that his employee . . . go through a picket line after they have elected not to, *and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council*, shall be sufficient cause for an immediate strike of all such Employer's operations without any needs of the Union to go through the grievance procedure herein." (Emphasis added) There is no allegation in the complaint that the refusal to go through picket lines was given such approval.

It is our opinion that the complaint does not contain facts which would show that the plaintiffs were warranted under the contract to leave their jobs on January 25th.

Finally, it appears that the purpose of the action is to recover for the individual plaintiffs lost wages together with incidental benefits to the Union based on the payment of wages to employees. This we think brings the facts of this case within the ambit of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437.

As was said in that case, p. 461; "Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one." See also *Communications Workers of America, AFL-CIO* v. *The Ohio Bell Telephone Co.*, 160 F. Supp. 822, affirmed 265 F. 2d 221, C.A. 6, cert. denied 361 U.S. 814.

The trial judge was right in dismissing the complaint and for the reasons stated herein the judgment of the District Court is affirmed.

JUDGMENT

January 31, 1962

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for Entry:
/s/ LESTER L. CECIL
U.S. Circuit Judge

ORDER

March 21, 1962

Upon consideration of the petition for rehearing, it is hereby denied.

/s/ LESTER L. CECIL
Circuit Judge

APPENDIX B

ORDER

A pre-trial conference was held in chambers on February 2, 1961 and there appeared Mr. Ralph H. Logan, for the plaintiffs, and Mr. H. Bemis Lawrence, for the defendant.

The question of jurisdiction having been considered and it appearing that this action is controlled by Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437, 99 L. Ed. 510, 75 S. Ct. 488 (1955),

It Is Ordered that the motion of the defendant, Riss and Company, Inc., to dismiss is sustained and the complaint dismissed.

/s/ HENRY L. BROOKS
United States District Judge.

February 2, 1961.

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For the Defendant:
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A Copy Attest,
MARTIN R. GLENN, *Clerk*
by LORAINE MILLER,
Deputy Clerk.

Office-Supreme Court, U.S.
FILED
NOV 29 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 180

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL,

PETITIONERS,

v.

RISS AND COMPANY, INC.,

RESPONDENT

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE PETITIONERS

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IN THE

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v.

RISS AND COMPANY, INC.,

RESPONDENT

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (R. 27) is reported at 298 F2d 341. The Order of the United States District Court for the Western District of Kentucky (R. 7), granting respondent's motion to dismiss the complaint, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1962 (R. 26), and its Order denying a petition for rehearing was issued on March 21, 1962 (R. 30). This Court granted Certiorari on October 8, 1962 (R. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Sec. 185, provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties."
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

QUESTIONS PRESENTED

1. Whether, under Section 301 of the Labor-Management Relations Act, federal district courts have jurisdiction of an action brought by a labor organization against an employer to enforce an award rendered by a bipartisan grievance committee pursuant to a collective bargaining agreement between the foregoing parties, whereby the said committee is constituted as the last step in the grievance procedure and its decisions are made final.

2. Whether the federal district courts are deprived of jurisdiction to enforce the award, as aforesaid, on the sole

ground that one of the benefits of said award accrues to individual employees who are represented by the plaintiff-labor organization.

3. Whether, in the foregoing context, a federal court of appeals exceeds the bounds of the permissible scope of review by making a decision on the merits of the grievance contrary to that of the grievance committee and, in so doing, resolving disputed facts without the benefit of evidence or argument by the parties.

STATEMENT

A. The Facts

Petitioner, General Drivers, Warehousemen and Helpers, Local Union No. 89 (hereinafter called Local 89), is a labor organization affiliated with the International Brotherhood of Teamsters, having its principal office in Louisville, Kentucky. The individual petitioners are members of said Local 89 and employees of respondent Riss and Company, Inc. (R. 2).

The respondent, Riss and Company, Inc., (hereinafter called Riss), is a Delaware corporation engaged in the interstate transportation of freight by motor vehicle, maintaining a freight terminal in Louisville, Kentucky. (R. 2).

At all times material herein, there was in full force and effect a collective bargaining agreement between Local 89 and Riss, governing the wages, hours and working conditions of the employees of Riss at the Louisville terminal (R. 3).

Article VIII, Section 1 of said agreement provides as follows (R. 8):

> "The Unions and the Employers agree that there shall be no strike, lock out, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise."

Under Articles VII and VIII, the grievance procedure consists of several "steps," commencing with informal discussion between the parties and progressing through appeals to bipartisan Committees called Joint Local Area Committee, Joint State Cartage Committee, and Joint Area Cartage Committee. (R. 8-9). Subsections (a) and (c) of Article VIII, Section 1 state that majority decisions of the Joint Local Area Committee and the Joint State Cartage Committee "will be final and binding on both parties." (R. 8-9). In the event these two Committees fail to reach a decision, subsection (d) affords an appeal to the Joint Area Cartage Committee. While in some such cases, the parties may agree to determination by an umpire, "matters pertaining to interpretation are not subject to umpire handling at this level." (R. 9). Subsection (e) states the following (R. 9):

> "It is agreed that all matters pertaining to the interpretation of any provisions of this contract shall be referred, at the request of any party at any time, for final decision to the Joint Area Cartage Committee after first being processed by the Joint State Cartage Committee."

Subsections (f) and (g) provide that only in case of deadlock, or failure of a Committee to meet without fault of the complainant, or refusal of either party to submit to or appear pursuant to the above procedure, or "failure to comply with any final decision," may the parties resort to other legal or economic recourse. (R. 9). Subsection (h) states that no interpretation of the Agreement by any tribunal is to be binding "it being the intention of the parties to resolve all questions of interpretation by mutual agreement." (R. 24).

One other provision central to this controversy is Article IX:

> "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees

refuse to go through the picket line of a union or refuse to handle unfair goods." (R. 4, 29).

On or about January 25, 1960, during the course of a labor dispute between Riss and Teamsters Local 107 of Philadelphia, Pennsylvania, Local 107 placed pickets at the Riss terminal in Louisville. The six individual petitioners herein, employees of Riss at Louisville, chose to respect and did respect the said picket line. On February 15, 1960, the six employees reported for work, and Riss refused to permit them to return to work. Thereupon, they filed grievances against Riss, seeking reinstatement and back pay, pursuant to the aforementioned provisions of the collective bargaining agreement. (R. 3).

The grievances were processed through the various steps of the grievance procedure, with full participation by the employees, the Union and the Employer at each and every step. At the terminal point of that process, the Joint Area Cartage Committee rendered a decision and award, directing that the six individuals be reinstated with full seniority and back pay. However, Riss refused and continues to refuse to abide by that decision. (R. 3-4).

B. The Proceedings Below

Petitioners thereupon brought suit against Riss to enforce the award in the United States District Court for the Western District of Kentucky, invoking the jurisdiction of that court under Section 301 of the Labor-Management Relations Act (29 U.S.C. 185). Therein, pursuant to the award, petitioners sought the reinstatement of the six employees with full seniority and back wages and fringe benefits owed them under the various provisions of the agreement (R. 2-7, 10-14). Thus, Petitioners demanded Judgment "that said six employees be reinstated with full seniority under the terms of said contract," that Riss restore to the Health and Welfare Fund and the Pension Plan all per capita payments withheld since the discharge of the em-

ployees, and that the dischargees be paid back wages and vacation pay. (R. 6-7). At a pre-trial conference held on February 2, 1961, and upon the motion of Riss to dismiss, the court sustained the motion and ordered the complaint dismissed for lack of jurisdiction on the authority of *Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U.S. 437 (1955). (R. 7).

Upon appeal to the United States Court of Appeals for the Sixth Circuit, that court affirmed the Order of the district court on three grounds:

First, the order of the Joint Area Cartage Committee was not "an arbitration award" that could be enforced by the courts and, therefore, "recent pronouncements of the Supreme Court with reference to arbitration are not controlling here;"

Second, upon that court's construction of the contract, the complaint did not state a cause of action;

Third, since "the purpose of the action is to recover for the individual plaintiffs lost wages together with incidental benefits to the Union based on the payment of wages to employees," the court is deprived of jurisdiction by *Westinghouse, supra.* (R. 27-30).

A Petition for Rehearing was denied on March 21, 1962, (R. 30).

ARGUMENT

I

SINCE UNDER THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES THE AWARD OF THE JOINT AREA CARTAGE COMMITTEE IS FINAL AND BINDING, THE AWARD IS ENFORCEABLE IN THE FEDERAL DISTRICT COURT PURSUANT TO SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, RE-

GARDLESS OF WHETHER IT IS THE PRODUCT OF "ARBITRATION" OR SOME OTHER FORM OF SETTLEMENT CHOSEN BY THE PARTIES.

The principal ground relied on by the court below in denying federal court jurisdiction over the instant action was that the award of the Joint Area Cartage Committee was not in the nature of "compulsory arbitration" or an "arbitration award" and lacked "finality." Accordingly, reasoned the court, "recent pronouncements of the Supreme Court with reference to arbitration are not controlling here." (R. 8). In this, the court was clearly in error.

Its apparent "findings" that utilization of the grievance procedure of the agreement was not "compulsory" or "final" are flatly contradicted by the explicit and clear provisions of the contract. The parties have chosen a method for settling their grievances whereby bipartisan committees determine controversies importantly affecting the employment relationship. Resort to these committees is compulsory. For under Article VIII, Section 1 of their agreement, the parties forego all means of self-help "without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." (R. 8). In subsection (e) thereof, the parties agree that all matters of interpretation of the contract "shall" be referred to the Joint Area Cartage Committee after decision by the Joint State Cartage Committee. (R. 9). The decisions of these Committees, moreover, are final and binding upon the parties. Thus, the majority decisions of the lower Committees are "final and binding on both parties." (Subsections (a) and (e); R. 8-9). And the decision of the highest Committee, the Joint Area Cartage Committee, is similarly a "final decision." (Subsection (e); R. 9). Its award in this case was issued in favor of petitioner with full participation by all the parties concerned. In the face of these uncontradicted facts, the contrary as-

sertions of the court below must fall as a matter of law.[1]

Next, even if that which is to be enforced under Section 301 must be "arbitration" or an "arbitration award," as intimated by the court below, the procedure agreed to and utilized by the parties fully qualifies.[2] Moreover, if the decision below is intended to require resort to an *outside umpire* as a prerequisite to Section 301 jurisdiction, it seriously undermines the force of logic and the policies underlying that Section. For there is nothing in the Agreement, or in practice, which suggests that the method chosen by the parties is less capable of maintaining labor peace between them than the process envisioned by that court. If anything, the parties would have greater confidence in their own representatives' personal judgment and knowledge of the common law of the shop than in the knowledge and judgment of an outside arbitrator.[3]

In any event, the decisions of this Court, including their many references to legislative history, as well as the plain meaning of Section 301, demonstrate most emphatically that the federal courts may and should enforce awards rendered

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[1] If a fact issue did exist as to the meaning ascribed by the parties to their grievance procedure, the question should have been decided in the district court, on the basis of record evidence, rather than by the court below.

[2] "ARBITRATION. The submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement." Black's Law Dictionary, 4th ed., p. 134 (West Publishing Co. 1957).

[3] It is significant that in *Denver-Chicago Trucking Co.*, 132 NLRB No. 123, 48 LRRM 1524 (1961), the NLRB honored a decision of the Joint State Cartage Committee, which is a part of the grievance procedure of the contract presently before the Court, to the same extent that it had previously honored decisions of arbitrators. Speaking of the instant contract, the Board said: "We note that the grievance procedure had been followed by the parties for 18 years and that it presumably satisfied both the employers and the unions as serving its purpose . . . We do not agree with the Trial Examiner that it is essential that a public member sit on grievance panels . . ." (48 LRRM at 1526 and fn. 6).

pursuant to the grievance machinery or other methods of settlement agreed upon by the parties—regardless of what the methods so chosen may be called. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960). Thus, in *Lincoln Mills*, *supra*, the Court pointed to a House Report on Section 301 which, so far as relevant here, stated: "When parties have agreed on *a procedure* for settling their differences, and the agreement is in effect, they will be required to follow the procedure . . . Most agreements provide procedures for settling grievances, *generally* including some form of arbitration as the last step." H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 21 (emphasis supplied). In the same opinion, Justice Douglas stated that the Norris-LaGuardia Act does not preclude enforcement of arbitration agreements because that Act indicates "a congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by *negotiation, mediation, or 'voluntary arbitration'*." (353 U.S. at 458) (emphasis supplied). In *American Mfg. Co.*, *supra*, addressing itself to the Sixth Circuit, the Court stated:

> "Section 203(d) of the Labor Management Relations Act, 1947, 61 State (sic) 154, 29 U.S.C. 173(d), states, 'Final adjustment *by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . .' *That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.*" (363 U.S. at 566) (emphasis supplied).

Finally, in the very recent decision of *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), this Court re-

versed the opinion of the Sixth Circuit that a "Statement of Understanding" between the parties was not enforceable under Section 301. On that occasion, it was the view of the court below that Section 301 applied solely to "collective bargaining agreements." In disagreement with that view, this Court stated the following:

> "The words of Section 301(a) require no such narrow construction as is suggested; rather, they negate it... The section says 'contracts' . . . If this kind of strike settlement were not enforceable under Section 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult . . . It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the employees of both respondents . . . It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within Section 301(a)." (369 U.S. at 25-28).

The lesson is clear, for the Section indeed says "contracts," and not "arbitration awards." Suffice it to say that the method of settling disputes in question here constitutes the agreement of the parties—it is their contract. And it has achieved, and continues to achieve, the same worthy objectives outlined by the Court in *Lion Dry Goods*. "Plainly it falls within Section 301(a)." (369 U.S. at 28).

In the instant case, however, the court below has held that the satisfactory grievance procedure contained in their agreements—a procedure that has permitted an amicable relationship for 18 years or more—is no longer a "contract" between them and is unenforceable under Section 301. The effect of the decision upon labor management relations is certain to be adverse. Many collective bargaining agreements across the nation contain similar methods for the settlement of disputes. Affiliates of the International Brotherhood of Teamsters, of which the petitioner is one,

alone are parties to at least six area-wide agreements utilizing similar methods of grievance settlement by Joint Committees and covering more than 300,000 employees.[4] Whether the reason for the employment of these particular procedures be the parties' greater confidence in their own representatives, the great expense of submission to an outside arbitrator, or a belief that the settlement of disputes between the parties themselves breeds an atmosphere of greater cooperation, the parties thereto have proceeded on the assumption that they are enforceable as are any other contracts. In practical terms, the decision below would now coerce these persons into revising their agreements to provide for a procedure specially favored by the court below, on pain of being barred from the courthouse door. As to those agreements that are not so revised, the final steps in the grievance procedure would no longer be amicable private or judicial settlement,[5] but interruptions in production, strikes, lockouts and general unrest and suspicion.

If these consequences are to be averted, and if the plain meaning of Section 301, the Congressional policy

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[4] The Automobile Carrier Truckaway and Automobile Carrier Driveaway Agreements cover 15,000 employees. The Central States Area—Local Cartage Agreement, presently before this Court, covers 100,000 employees. The Central States Area—Over-the-Road Motor Freight Agreement, which was extensively discussed in *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959), covers 55,000 employees. The Motor Transport Labor Relations, Inc. (Philadelphia, Pa., area) covers 25,000 employees. The New York-New Jersey Area General Trucking Agreement covers 50,000 employees. Finally, the Western States Area Master Freight Agreement covers 60,000 employees. See Ward and Groner, "Major Agreement Expirations and Reopenings in 1962," Monthly Labor Review, pp. 1316-1317 (December 1961).

[5] It should be noted that by providing, in Article VIII, that there shall be no "legal proceedings" without prior resort to the grievance procedure, the parties themselves contemplated that the decision produced by resort to that procedure could be legally enforced in the courts.

underlying it, and decisions of this Court establishing a body of federal substantive law thereunder are to be adhered to, the interpretation of the law and construction of the contract by the court below must be held to be erroneous.

II

THE FEDERAL DISTRICT COURT WAS NOT DEPRIVED OF JURISDICTION OVER THE UNION'S ACTION TO ENFORCE THE AWARD OF THE JOINT AREA CARTAGE COMMITTEE MERELY BECAUSE ONE OF THE BENEFITS OF THE AWARD WOULD ACCRUE TO INDIVIDUAL EMPLOYEES REPRESENTED BY SAID UNION.

A second ground for the decision below was that "the purpose of the action is to recover for the individual plaintiffs lost wages together with incidental benefits to the Union based on the payment of wages to employees." According to that Court, this "brings the facts of this case within the ambit of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437." (R. 29).

The *Westinghouse* doctrine, however, has apparently been overruled, *sub silentio*, by subsequent decisions of this Court. In *Westinghouse*, a majority of the Justices held that federal courts may not assume jurisdiction over an action brought by a union under Section 301 to recover wages owing to individual employees under a collective bargaining agreement. The distinction drawn by the Court was between uniquely personal rights of employees arising out of individual hiring contracts and rights and obligations "running to the union." The principal basis of that decision was the Court's desire to avoid the constitutional difficulties inherent in a holding that Section 301 vested federal courts with jurisdiction over contract actions without empowering them to fashion federal substantive law to govern such actions. That problem was resolved in

Lincoln Mills, supra, where the Court held that Section 301 was not a mere grant of jurisdiction, but a direction to the federal courts to create a body of federal law governing the enforcement of contracts under that Section. Thus, the rationale underlying the *Westinghouse* decision was swept aside. Subsequently, in *Charles Dowd Box Co.* v. *Courtney,* 368 U.S. 502 (1962), the Court affirmed a decision of the Supreme Judicial Court of Massachusetts upholding a judgment for back wages in favor of employees, in a suit brought by union officers on behalf of the membership under Section 301.[6] It would seem, therefore, that both the legal and the factual foundations of the *Westinghouse* case have been shattered, leaving nothing but an empty shell. And if the shell continues to emit echoes, they should now be silenced by clear expression such as that utilized by the dissenting opinion in *Westinghouse:*

> "We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving the construction and enforcement of the collective bargaining agreement." (348 U.S. at 465, 466).

The expression finds approval in the opinion of the commentators,[7] Section 301 itself,[8] and the common sense view of the realities of collective bargaining.[9]

In any event, assuming *Westinghouse* retains some vital-

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[6] Although the suit originally sought a determination as to the validity of the whole contract, as well as back pay, the former aspect of the case became moot and the final decree entered in the case merely awarded damages representing wages owed to the employees.

[7] Both Professors Cox and Gregory, for example, favor giving the Union control over all claims arising under the collective agreement. Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 24 (1958); Gregory, "The Law of the Collective Agreement," 57 Mich. L. Rev. 635, 642-643 (1959).

[8] "Any such labor organization may sue or be sued as an entity and *on behalf of the employees whom it represents* in the courts of the United States." (emphasis supplied).

ity, it is inapplicable to the instant case. That case involved a suit solely for wages, under a contract provision requiring the payment of compensation to employees, and was strictly limited to its facts by the various opinions of members of the Court. Thus, Justices Frankfurter, Burton and Minton stated that no jurisdiction may be asserted over union suits to enforce contract provisions "relating to compensation, terms peculiar in the individual benefit which is their subject matter . . ." (348 U.S. at 460). Justices Warren and Clark emphasized that the union was attempting to enforce "the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer." (at 461). Finally, Justice Reed noted: "The claim for wages for the employees arises from separate hiring contracts between the employer and each employee . . . The duty to pay wages to an employee arises from the individual contract . . ." (at 464). It is plain enough that in excluding the enforcement of "uniquely personal" rights from union control in terms of suits under Section 301 the Court had in mind the attempted enforcement by unions of such provisions of collective agreements that merely repeat those ordinarily found in individual hiring contracts. The Court was apparently of the view that these latter provisions were not dependent upon union organization and were of little importance to the whole body of employees in the collective sense. But such is not the case here. In this case, the suit by the Union seeks not only back pay, but reinstatement of the discharged employees and reimbursement of the Health and Welfare Fund and Pension Plan as well. Significantly, the request for reinstatement is sought on the ground that the Company had violated Article IX which protects employees from dis-

[9] Further argument on this point would be repititious of the excellent treatment accorded it in Reply Briefs for the Petitioner (filed September 26, 1962), and for the United States as Amicus Curiae (filed October 9, 1962) in *Smith* v. *Evening News Ass'n*, Case No. 13 (October Term, 1962).

charge for aiding the cause of unionism in the event they choose individually to refuse to cross a picket line. (R. 4, 29). This type of provision, while common to collective bargaining agreements, is entirely foreign to individual hiring contracts and plainly may not be viewed as uniquely personal.[10] The same is true of course of the Union's attempt in this case to enforce the Health and Welfare and Pension provisions of the collective agreement. (R. 4). True, employer payments under the foregoing provisions are geared to the number of employees represented and are delinquent only as to the six dischargees in the case. But both provisions establish independent trust funds that are jointly administered by trustees appointed by the contracting parties. They are very definitely the unique product of collective bargaining and are outside the realm of individual enforcement. Perhaps the only accurate statement of description of the instant action is that it involves "a coalescence of individual and collective interests."[11] *Westinghouse* leaves such actions untouched.[12]

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[10] That a simple discharge is within the realm of union interests and often gives rise to collective action was expressly recognized by Justice Frankfurter in his opinion in *Westinghouse* (at 457-458).

[11] Meltzer, "The Supreme Court, Congress, and State Jurisdiction over Labor Relations," 59 Col. L. Rev. 269, 272 (1959).

[12] Even if the Court continues to adhere to its ruling in *Westinghouse*, the jurisdiction of the lower court in this case may be affected only insofar as the Union's action seeks to recover back pay to which the individual employees are entitled. It is clear, however, that to the extent that the Union's complaint seeks reinstatement of the six employees to their former positions and contribution by the employer to the Health and Welfare and Pension Funds Section 301 jurisdiction obtains. Since to that extent, at least, the jurisdiction of the lower court was properly invoked, it follows—under the well-established doctrine of pendent jurisdiction—that it was also empowered to assert jurisdiction over, and to decide, that portion of the action relating to the wage claim. *Hurn* v. *Oursler*, 289 U.S. 238 (1933); *Siler* v. *Louisville & N. R. Co.*, 213 U.S. 175 (1909); *Lincoln Gas & E. L. Co.* v. *Lincoln*, 250 U.S. 256 (1919).

Even clearer, by virtue of decisions of this Court, is the fact that *Westinghouse* has no application to actions brought by unions under Section 301 in enforcement of the grievance machinery agreed to by the parties to the collective agreement, even where the tangible benefits to be gained by success would accrue solely to individual employees. *Lincoln Mills*, for example, was a union action to enforce an agreement to arbitrate a grievance which, at the time of the decision, amounted to nothing more than back wages owing to individual employees. Justice Douglas, for the Court, distinguished *Westinghouse:*

> "The basic question concerned the standing of the union to sue and recover on those individual employment contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it has made with the employer." (353 U.S. at 456, fn. 6).

In a concurring opinion, Justices Burton and Harlan wrote:

> "The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union." (at 760).

In a companion case, *General Electric Co.* v *Local 205, UEW*, 353 U.S. 547 (1957), the Court permitted the assertion of Section 301 jurisdiction over a union action to compel arbitration of an employee claim of wrongful discharge. Concurring in *American Mfg. Co., Warrior and Gulf Nav. Co.*, and *Enterprise Corp.*, where this Court ordered the enforcement of arbitration agreements and awards thereof pursuant to Section 301, Justice Brennan—joined by Justices Harlan and Frankfurter—stated the issue as follows:

> "The issue concerns the enforcement of but one promise—the promise to arbitrate in the context of an agreement dealing with a particular subject matter, the industrial relations between employers and employees . . . And I emphasize this, for the arbitration promise is itself a contract." (363 U.S. 569-570).

In all Circuits which have considered the issue, except the Sixth, the courts have limited the application of *Westinghouse* to actions brought by unions seeking solely and directly to recover for individual employees personal benefits under the contract, in strict adherence to the foregoing admonitions of this Court. The *Lincoln-Mills-Westinghouse* dichotomy was most comprehensively yet precisely explained in *United Steelworkers v. Pullman-Standard Car Mfg. Co.*, 241 F2d 547, 551 (3rd Cir. 1957):

> "Collective bargaining agreements usually include provisions which regulate the procedure to be followed by the employer and the union inter sese in the handling of grievances and the solving of other labor problems which may arise in the future. Such regulations of the union management relationship in the administration of the process of collective bargaining are obviously a special concern of the Union as an organization and, in that sense, their enforcement is not a matter 'uniquely personal' to the individual employees. True, the subject matter in dispute may or may not be primarily personal to employees. Any agreed grievance procedure may cover controversies ranging from wage disputes to questions of union recognition. But so long as the matter immediately in issue is an alleged obligation to arbitrate, or negotiate or follow some other procedure in administering the collective agreement, the union is directly and primarily concerned."

That enforcement of grievance provisions of collective bargaining agreements may not be deemed "personal to employees" was similarly stressed in *Item Co. v. N.O. Newspaper Guild*, 256 F2d 855 (5th Cir. 1958), cert. den. 358 U.S. 867 (1958), involving a union suit to require the employer (appellant) to submit to arbitration the discharge grievance of a single employee. "We think it plain," said the court, "that appellant, in arguing that the suit is within the prohibition of the *Westinghouse* case, has misunderstood the demand being made by appellee, has in short misconceived the nature of its suit, which was filed for the sole purpose of obtaining enforcement of a contract agreement

between the Union and employer for arbitration, an agreement existing between union and employees and not employee and employer." (at 856). The same rationale has been applied as to suits by unions *to enforce arbitration awards* granting back pay to individual employees. Thus, in *Textile Workers Union* v. *Cone Mills Corp.*, 268 F2d 920 (4th Cir. 1959), cert den. 361 U.S. 886 (1959), the court concluded—in reliance upon decisions of this Court—that "Congress intended to place the enforcement of the arbitration clauses of labor contracts in the hands of the federal courts even if the employees are the ultimate beneficiaries." (at 924).[13]

In the foregoing fashion, the courts have made it abundantly clear that union actions to enforce agreements to arbitrate and awards pursuant to such agreements are enforceable under Section 301, even where the ultimate tangible benefit to be derived is "to recover for the individual plaintiffs lost wages." (R. 29). The opinion of the court below that benefits accruing to the union in such actions are "incidental" misinterprets the authoritative decisions of this Court and misconceives the nature of collective bargaining agreements and the union's role in their enforcement. The collective agreement is "a code for the government of an industrial enterprise." *Aeronautical Industrial District Lodge 72* v. *Campbell*, 337 U.S. 521, 528 (1949). As stated by this Court in *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 202 (1944), "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."[14] The major ve-

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[13] And cf., *American Brake Shoe Co.* v. *Auto Workers Local 149*, 285 F2d 869 (7th Cir. 1961) with *Local Lodge 2040, IAM* v. *Servel, Inc.*, 268 F2d 692 (7th Cir. 1959).

[14] According to then Professor Cox, the "governmental nature of a collective bargaining agreement should have predominant influence in its interpretation." Cox, *supra*, note 7, at 25. Professor

hicle for the administration and perpetuation of this system of self-government with a minimum of industrial strife is very obviously the grievance procedure agreed to by the parties. As the "exclusive representative" of the employees under Section 9 of the Act, it is the union's function to maintain the vitality of the agreement upon which the collective government is based.[15] The union is, in this case, attempting to perform that necessary function by enforcing a promise, made directly to it, to abide by awards rendered by a bipartisan committee at the final stage of the grievance procedure. It is a very basic promise—the only one in the contract that underlies the administration and interpretation of each and every one of the remaining provisions of the agreement. To deny its enforcement by the union is to deprive the union of effectiveness as the exclusive representative of the employees and thus deny the very basis for its existence. It further has the effect of subverting the statutory grant of collective power wherever the attempted enforcement of that power coincides with an attempted enforcement of "individual" rights, a result which this Court long ago denounced.[16]

In short, even if *Westinghouse* remains vital, its applica-

Shulman has emphasized, as have many other commentators, the parties' "continuing relationship," their "going systems of self-government," and their "autonomous system." Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1024 (1955).

[15] While the individual employees involved may be entitled to seek direct recovery of back pay and other personal forms of relief, as apparently envisioned by *Westinghouse*, they may not do so in reliance on, or in enforcement of, an award rendered by the grievance committee. Cf. *MacKay* v. *Loew's, Inc.*, 182 F2d 170 (9th Cir. 1950). That is the role of the union alone.

[16] "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338 (1944).

tion in this case clearly contravenes the decisions of this and other federal courts and subverts the policies of Sections 9 and 301 of the Act.

III

THE COURT BELOW EXCEEDED THE BOUNDS OF THE PERMISSIBLE SCOPE OF REVIEW BY MAKING A DECISION ON THE MERITS OF THE GRIEVANCE AND, IN SO DOING, RESOLVING DISPUTED FACTS WITHOUT THE BENEFIT OF EVIDENCE OR ARGUMENT BY THE PARTIES.

A final ground for the conclusion of the court below was its decision, *on the merits*, that plaintiffs were not entitled to reinstatement and back pay. This decision is contrary to that of the Joint Area Cartage Committee, and plainly in conflict with the following provision of the contract:

> "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union or refuse to handle unfair goods." (R. 4, 29).

The court arrived at its conclusion by an independent interpretation of the contract. In particular, the court stated that the foregoing clause "must" be read with the following:

> "The insistence by any Employer that his employee . . . go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operations without any needs of the Union to go through the grievance procedure herein." (R. 29).

Because the complaint did not allege that the refusal to go through the picket lines was given such approval, the court

concluded that the individual plaintiffs were not warranted in "leaving their jobs" and therefore the discharge was justified. (R. 29). The provision cited by the court has nothing to do with the rights of individuals to refrain from crossing a picket line. It is obviously a limited exception to the "no strike" clause, *permitting the Union to strike* in the event the rights of employees are denied by the Employer. The "approval" which the court found lacking here is necessary only in the event the Union desires to strike. The Union, however, neither sought such approval nor intended to strike. It chose to uphold the rights of employees under the first-quoted clause by resort to the grievance machinery of the contract. Thus, the interpretation placed upon the contract by the court below is patently wrong.

Even if the provision relied on by the court is arguably pertinent, its application by the court required the assumption of certain facts that may be very much in dispute between the parties: First, that the foregoing clause dealing with the right to strike was intended by the parties to affect the right to discharge; second, that individual refusals to cross a picket line may be equated with a union "strike," within the meaning of that section; third, that Local 89 was in fact engaged in such a "strike" at the time in question; and fourth, that the Union engaged in such "strike" without having gone through the grievance procedure. These crucial "fact findings" were made without the benefit of evidence or argument in the courts below. In fact, the only ground relied on by the District Court for dismissal of the complaint was lack of jurisdiction. Nor was this construction of the contract suggested by the respondent before the grievance committees or in its brief or argument to the court below. Had petitioners been timely warned of the *matter of defense* now relied on by the court in respondent's behalf, they undoubtedly would have been in the position to

submit evidence and argument on the point or to move to amend the complaint. But such opportunity was denied absolutely. The rules are well settled that an appellate court may not, consistent with the accepted and usual course of judicial proceedings and fairness to the parties, assume facts not stated in the complaint upon review of a dismissal on the pleadings, or make findings of fact *dehors* the record before it. As stated in *Carr* v. *Corning*, 182 F2d 14, 21, 22 (D.C. Cir. 1950):

> "An appellate court cannot be the trier of facts, and particularly it cannot decide a question of fact upon evidence which is not in the record. We cannot make findings of fact different from the allegations of the pleadings and affidavits upon which summary judgment or dismissal was entered below . . . We cannot draw conclusions by speculation where the data necessary for certainty was not given the trial court."[17]

In addition, said decision on the merits of the dispute that had already been decided by the Committee, exceeds the bounds of the limited role of the courts in cases arising under Section 301, as clearly defined by this Court. In *American Mfg. Co., supra*, the Court reversed a similar decision of the Sixth Circuit that a grievance of which arbitration was sought was frivolous and not subject to arbitration. During the course of the opinion, this Court took great pains to examine the relationship between the arbitrator and the judge in a Section 301 context:

> "The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plan or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious . . . The function of the court is very limited when the parties have agreed to submit all ques-

---

[17] See also *U.S.* v. *Hoffman*, 335 U.S. 77 (1948); *Ex parte Century Indemn. Co.*, 305 U.S. 354 (1938).

> tions of contract interpretation to the arbitrator . . . Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator . . . The courts, therefore, have no business weighing the merits of the grievance . . ." (363 U.S. at 567-568).

In *Enterprise Corp., supra*, the Court delineated the function of the courts upon review of an arbitration award already rendered:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." (363 U.S. at 596).
>
> ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (363 U.S. at 599).

Here, the merits of the dispute were precisely that which the court below determined. Its own construction of the contract, as well as its final conclusion, differed from that of the Committee—whose construction and decision had been "bargained for" by the parties.[18] Absent the benefit of evidence or argument, the court determined the issue. And it did so in disregard of the narrow standard of review promulgated by this Court in *Enterprise*—to-wit, whether it is "apparent" that the decision of the Committee went beyond the submission. (363 U.S. at 598). Plainly, adherence to decisions of this Court compels a different result.

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[18] The Court's attempt to interpret the contract was of course in direct contravention of the agreement of the parties that all matters of interpretation would be settled by mutual agreement only. Article VIII, Section 1, subsections (c) and (h). (R. 9, 24).

CONCLUSION

It is respectfully submitted that, for the reasons stated above, the decision of the court below should be reversed with directions to remand the case to the District Court for such further action as is consistent with the opinion of this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 180

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, ET AL., Petitioners,

versus

RISS AND COMPANY, INC., Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 180

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, ET AL., - - - - - *Petitioners,*

v.

RISS AND COMPANY, INC., - - - - *Respondent.*

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF THE RESPONDENT.

May it please the Court:

QUESTIONS PRESENTED.

1. This is an action seeking individual accounting and monetary awards on behalf of six former employees of Riss and Company, Inc., who abandoned their posts of employment on January 25, 1960, and took voluntary leaves of absences without notice to the employer. They seek $2.50 per week per employee for health and welfare benefits, the sum of $4.00 per week per employee for pension benefits, individual vacation pay, back wages and reinstatement. (See prayer in original Complaint, R. 6.)

Does the United States District Court at Louisville, Kentucky, have jurisdiction under Section 301 of the Labor Management Relations Act as amended?

2. Is the purpose of the Labor Management Relations Act to protect the general welfare of a community by minimizing a substantial disruption of interstate commerce, or is its purpose to compel the federal district courts to assume jurisdiction of the trivial monetary controversies arising between employees and employers over wages, vacation benefits and related minor issues which, traditionally, have been adjudicated in the local inferior courts?

3. Does the Labor Management Relations Act require the federal district courts to act as the enforcement and collection agency of *every** grievance award throughout our land, regardless of the minuteness of the issue, or was it designed to apply to industries or communities as a whole where there has been a substantial obstruction to the free flow of commerce?

4. Was the refusal to employ back the six individual Petitioners who abandoned their posts voluntarily in order to participate in an illegal strike justified, thus failing to state a legal cause of action in the Petitioners' complaint?

5. Once state court jurisdiction has been invoked, is there concurrent federal jurisdiction without the customary removal procedure?

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*All emphasis supplied.

STATEMENT OF FACTS.

On January 25, 1960, Petitioners Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay were employed by the Respondent at its truck terminal in Louisville, Kentucky. All were members of Petitioner's Union, Local No. 89, and Elvin Peay was the steward thereof.

Local No. 107 of the same International Union with local headquarters at Philadelphia, Pennsylvania, sent several of its members to the Louisville Terminal of the Respondent early on the work day of January 25, 1960, and they commenced carrying and displaying conspicuously strike signs with reference to this Respondent.

Without any notice whatsoever, and contrary to different provisions of the collective bargaining contract, the aforesaid six individual Petitioners immediately abandoned their respective posts of employment at the said time and place. None of the Petitioners, including Local No. 89, sought negotiations and settlement as provided for by the written contract. To the contrary, the six individual Petitioners went to the outer entrance of the Respondent's terminal and proceeded to, and did, march back and forth near said entrance, carrying signs captioned "Local 89 on Strike" and "Riss-Strike" and physically threatened customers, invitees and other employees of the Respondent and, acting in concert with each other, did strike, commit a tie-up and work stoppage, all of which con-

tinued for a period of several weeks and without making any attempt to invoke the grievance procedure (R. 19).

On January 28, 1960, the Respondent filed suit in the Jefferson County, Kentucky, Circuit Court in connection with the action arising out of the same circumstances and involving the same issues. All of the Petitioners are duly before that Court, have filed responsive pleadings thereto and a restraining order was entered on the same date (R. 16).

Because of the abandonment of their posts in violation of the terms of their contract, it was necessary for the Respondent to, and it did, make other arrangements by separate agreement with an independent contractor to handle the cartage duties previously performed by the six individual Petitioners, all of whom are reported to have been employed elsewhere continuously since February 16, 1960 (R. 19).

The individual Petitioners did not file any grievance until reporting back to work on February 15, 1960, approximately two weeks after the Respondent had already made other necessary arrangements for the work in question. The subsequent grievance procedure was a moot and sham proceedings in that the contract was no longer in force because of the previous actions of the Petitioners in breaching the contract. There is now pending in the State Court a claim against the same six Petitioners for monetary damages growing out of their actions in question (R. 16).

United States District Judge Henry L. Brooks dismissed the claim in this action for lack of juris-

diction in view of the facts and authorities discussed hereinafter.

The United States Court of Appeals for the Sixth Circuit affirmed the decision of Judge Brooks and further held that the complaint did not contain facts reflecting that the Petitioners were warranted under the contract to leave their jobs on January 25, 1960. A petition for rehearing was denied by the same Court.

ARGUMENT.

I.

The Labor Management Relations Act Itself Reflects It Is To Be Utilized Only in Cases Affecting Commerce, an Industry as a Whole, or the General Welfare of the Community, and Is Not Applicable in a Personal Accounting of Purely Individual Alleged Claims of Employees or Employers.

A reading of the Labor Management Relations Act, as amended, produces a profound and articulate realization that such Act was never enacted by the Congress for the purpose of settling individual monetary disputes between employer and employee. To the contrary, we observe in Section 1 of the Act (29 U.S.C. Sec. 141) under the heading of "Short Title and Declaration of Policy" that neither labor nor management ". . . has any right in its relations with any other to engage in acts or practices *which jeopardize the public health, safety, or interest.*"

The same Section provides that it is the purpose and policy of the Act to promote the "full flow of com-

merce" and to deal with situations ". . . which affect commerce *and are inimical to the general welfare, and to protect the right of the public* in connection with labor disputes affecting commerce."

Under Section 101 (29 U.S.C. Sec. 151) further outlining the general policies of the Act, it is the announced intention through the provisions of this legislation to:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain *substantial* obstructions to the free flow of commerce and to mitigate and eliminate these obstructions. . . ."

Likewise, in the same Section, Sub-section (d), another objective is to prevent diminution of employment and wages *in such volume* as *substantially* impairs or disrupts the market for goods flowing from or into the channels of commerce.

Also, in Section 2 of Section 101 (29 U.S.C. Sec. 152) the term "affecting commerce" is described as "burdening or obstructing commerce or the free flow of commerce, . . ."

Moreover, in Section 203(a) (29 U.S.C. Sec. 173) under "Functions of the Service" it is spelled out clearly that it is the duty of the Service to prevent or minimize interruption of the *free flow of commerce.* In Sub-section (b), the terminology again refers to ". . . such dispute threatens to cause a *substantial* interruption of commerce." Immediately following, it provides that the Director and the Service are di-

rected to avoid attempting to mediate disputes which would have only a *minor affect on interstate commerce.*

Again, just immediately prior to Section 201 (29 U.S.C. Sec. 171) is this heading in bold letters: "CONCILIATION OF LABOR DISPUTES: *NATIONAL EMERGENCY.*"

Similarly, Section 204 of the Act (29 U.S.C. Sec. 174) provides for a formula in order "to prevent or minimize interruptions of the free flow of commerce."

In Section 208(a) (29 U.S.C. Sec. 178) it is observed that the United States Government may participate on an emergency basis where an *entire industry* or a *substantial part thereof* is involved, or where the *national health* or *safety* is imperiled.

Even Section 301(a) (29 U.S.C. Sec. 185), specifically and clearly vests jurisdiction only in an industry ". . . *affecting commerce as defined in this Act,* . . ."

The apparent and significant intention of the Congress in using this clear language is to give our federal courts jurisdiction in those actions which *vitally* affect commerce, an industry as a whole, or the general welfare of the community. It is designed to prevent a tie-up of any given industry, or a *substantial* portion thereof, so as to avoid crippling seriously a mass project within an entire industry or to place in jeopardy the necessities of a people within a particular community. The image projected is large. This Act was invoked in the recent steel strike which seriously affected the lives of thousands of our citizenry.

In contrast, the facts in question cannot by any stretch of the imagination be considered so as to have a *"substantial"* interruption of commerce. Conversely, the facts are *peculiar only to the six individual Petitioners and this Respondent.* They do not involve an interruption of the free flow of commerce and have no affect upon the welfare of a community or an industry.

The *sole* purpose of this action is to seek alleged back wages, health and welfare benefits, pension benefits and vacation pay as well as reinstatement of six former employees who purportedly have been employed continuously elsewhere since February 16, 1960 (R. 19). It is significant to read the exact demands contained in the conclusion of the complaint (R. 6-7).

II.

The Identical Issues Have Already Been Resolved by This Court.

This Court reviewed thoroughly the same issues presented in this action in 1955. The case of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation,* 348 U. S. 437, 99 L. Ed. F10, 75 S. Ct. 488, involved an action brought by a Union on behalf of many employees for accrued wages which the employer refused to pay in an alleged violation of a collective bargaining agreement between the Union and the employer. In affirming the United States Court of Appeals for the Third Circuit and the United States District Court for the Western District of Pennsylvania, this Court held that Section 301 did not confer jurisdiction on an action involving a monetary

accounting between the employer and employee because a favorable "... interpretation would bring to the federal courts an *extensive range of litigation* heretofor entertained by the states ..."

In keeping with the theory advanced as to the meaning of the Act, as outlined in the immediately preceding topic, it is interesting to note one of the many findings in the *Westinghouse* case, *supra*, as follows:

> "*Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the Union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one.*"

Also, this Court further observed that there was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a *potential flood* of grievances based upon an employer's failure to comply with terms of a collective bargaining agreement relating to compensation and which, if and when violated, gives a cause of action to the individual employee. The decision further reflected that employees have always been able to enforce their individual rights in the state courts.

Mr. Justice Frankfurter announced the judgment of the Court in an opinion in which Mr. Justice Burton and Mr. Justice Minton joined. Mr. Chief

Justice Warren and Mr. Justice Clark concurred as did Mr. Justice Reed. This opinion reflects minute deliberation, consideration and research. There was no doubt whatsoever in the minds of these six members of the Court that Congress did not intend to authorize a Union to enforce in a federal court *"the unique personal rights"* of an employee to receive compensation for services allegedly rendered his employer. A seventh member, Mr. Justice Harlan, took no part in the consideration or decision of this case, while Mr. Justice Douglas and Mr. Justice Black dissented.

The foregoing decision is sound logically and clear theoretically. The Petitioners contend that *every* grievance award should be the subject of jurisdiction in a federal court. Let us view the impact this would have upon our federal court system. In the first place, a grievance that was decided on the local leval, comparable to the Joint Local Area Committee in the instant contract (R. 8), is not appealable in the grievance procedure where a majority vote has been had. Thus, if one of the parties did not comply with the grievance award rendered at the *lowest* level, the Petitioners contend it should be enforced in the local United States District Court, whether it involved one employee for one day's salary or whether the employee has left his post of duty owing the employer a sum of money, regardless of how insignificant it may be.

There are thousands and thousands of collective bargaining agreements covering hundreds of thousands of employees in our fifty states, an example of which is mentioned in footnote 4 on page 11 of the Peti-

tioner's brief. When we consider the *magnitude* of this potential volume of cases, it is readily apparent as to the judiciousness and logic of the decision in the *Westinghouse* case, *supra*. If the Petitioners' version were adopted, and *all grievance awards* entered on a local, state or area level were brought to the federal courts for enforcement, a city the size of Louisville, Kentucky, undoubtedly would have to double its federal court facilities, for it is difficult to envision the large number of individual accounting cases which would be instituted solely for the purpose of receiving money awards. Extending this to a national level, the entire federal jurisprudence processes would necessarily have to be revolutionized.

Another significant and sound pronouncement in the *Westinghouse* case, *supra*, is that the collective bargaining contract itself is not a contract of hire; that not until an employee enters into an individual contract of hire and performs services does the employer become bound to pay the particular employee the specified wages; and if there were a breach in this case, which the Respondent vehemently denies, it was a breach of the *individual* employment contract and not otherwise. Again, the soundness of this theory cannot be attacked for there is definitely an employer-employee relationship between the two. This is evidenced by the fact that the employer withholds federal, state and city income taxes, makes contributions to the Social Security benefits of the employees, pays unemployment insurance benefits, workmen's compensation insurance premiums and performs many other

functions solidifying the personally unique contractual relationship between the employee and his employer. Otherwise, the Union would be an independent contractor and obligated to furnish the services of *its employees to the employer,* which is without foundation.

What, then, is the meaning of the provisions in Section 301 of the Act? The United States Court of Appeals for the Tenth Circuit in the case of *United Steelworkers of America (AFL-CIO), Local Union No. 4264* v. *New Park Mining Company*, 273 F. 2d 352 (1959), has an excellent approach on page 355. That Court in discussing the provisions of Section 301 stated that federal court jurisdiction has been restricted to contract violations of *"peculiar concern"* to the Union as an organization, such as agreements to *arbitrate* wages, hours and conditions of employment, etc. (*United Steelworkers of America* v. *Pullman-Standard Car Co.*, 3 Cir., 241 F. 2d 547). Federal jurisdiction, according to the same decision, does not extend to the enforcement of rights which are "uniquely personal" to the employees, such as *back wages* and *vacation pay.*

The same decision further points out that although Rule 17(a), F. R. Civ. P. authorizes the Union being sued as the party in whose name the bargaining contract was made for the benefit of the employees, *it does not operate to confer jurisdiction which does not otherwise exist.* The court also said: "The claimed benefits ran to the employees, not to the Union, and they could not *aggregate* them for purpose of federal jurisdiction."

It is contended, therefore, that in keeping with the decisions of this Court in the *Westinghouse* case, *supra*, the general facts and conditions herein continue to be the same and the potential results *even more frightful* if the policy were altered. Individual accounting rights for back wages and vacation pay are taboo. The federal courts were never designed to become a collection agency in the common monetary disputes between employers-employees, especially where there has been a termination of the individual contract, be it specific or implied. *Specific performance* actions to enforce agreements to arbitrate wages, hours and conditions of employment where an industry, "substantial" commerce or a community is involved would appear to be an application. Where there has been a formal arbitration involving policies of an *overreaching* character, then such arbitration award could and should be enforced.

Regardless, however, of how it may be sized, shaped, or viewed, the federal courts certainly are no place for the bars to be let down and to be used as collection agencies in the purely accounting monetary controversies which are inherent only to an interpretation of the individual employee-employer contract of employment. *Every* employee in any factory enters into such an agreement when he commences work at the factory or terminal and it is these personal controversies which have no place on the dockets of our federal courts.

III.

The State Court Has Assumed Jurisdiction.

In keeping with the observations of this Court in the *Westinghouse* case, *supra*, it is of unusual interest to note (R. 16) that a suit was filed on January 28, 1960, by the Respondent against all of the Petitioners in Action No. 47351, in the Jefferson County, Kentucky, Circuit Court, Chancery Branch, First Division, and that the parties are identical. It is further observed that all of the Petitioners are duly before the Court in that action and have filed responsive pleadings thereto and that a restraining order was entered on the same day; that said action arose out of the same circumstances and involves the same issues; that jurisdiction has already been assumed and a final determination has not been had in the State Court action; and that no petition for removal to the United States District Court was asked or granted. The Petitioners are now estopped from bringing this action, which was filed on May 17, 1960.

Under the decision of *Dowd Box Company* v. *Courtney*, 368 U. S. 502, this Court simply affirmed the decision of the court of last resort of Massachusetts in that the *state courts had concurrent jurisdiction* over matters involving Section 301. This decision, in footnote 4 at page 483, points out that 28 U.S.C. Sec. 1331 limits actions in the federal courts if they do not involve the sum or value of $10,000.00. It is obvious from the prayer contained in the original complaint herein, *supra*, that such amount could not be involved

and therefore jurisdiction should not be had in the federal courts.

It is interesting to note the following conclusion contained in the *Dowd Box Company* case, *supra*, as follows:

> "*This basic purpose of Section 301* is epitomized in the Senate Report; it is apparent that until all jurisdictions, and particularly the federal government, *authorizes actions against labor unions as legal entities*, there will not be the mutual responsibility necessary to vitalize collective bargaining agreements."

Again, his decision in no way deviates from the principles announced in the *Westinghouse* case, *supra*, and confirms again that federal jurisdiction should not be had in this instance.

IV.

Petitioners Themselves Breached the Collective Bargaining Agreement and Are Now Estopped From Claiming Relief.

The *chief benefit* accruing to the Respondent in entering into the collective bargaining agreement was to obtain relief from strikes, lockouts, tie-ups or other types of harassment and inconvenience from its employees. Section 1 of Article VIII of the agreement (R. 8) provides as follows:

> "The Unions and the employers agree that there shall be no strike, lockout, tie-up, or legal proceedings *without first using all possible means*

of a settlement, as provided for in this agreement, of any controversy which might arise.

"Disputes shall first be taken up between the employers and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply: . . ."

Let us examine the actions of the Petitioners. Prior to January 25, 1960, Local 107 of the same Union located at Philadelphia, Pennsylvania, with the same type of contract as involved herein, arbitrarily breached said contract and created a tie-up, went on strike causing a work stoppage without first using any means whatsoever for settlement, all contrary to the said written contract; that members of Local 107, which has the same International President and identical International Constitution and Rules and Regulations as Local 89, caused to, and did, send numerous of its members to the Louisville terminal of the Respondent, arriving during the work day of January 25, 1960, and commenced carrying and displaying conspicuously strike signs with reference to this Respondent (R. 18).

Without any warning or notice whatsoever, the six individual Petitioners herein left and abandoned their posts of employment at the said time and place and Petitioner Elvin Peay, Steward, and John West, Business Agent of Local 89, informed this Respondent that Local 89 was on strike against this Respondent and that it was an authorized one (R. 18).

The six individual Petitioners, after abandoning their posts of employment, went to the outer entrance

of the Respondent's terminal and proceeded to, and did, *march back and forth near said entrance carrying signs* "Local 89 on Strike" and "Riss-Strike" and *physically threatened customers, invitees and other employees* of the Respondent who were seeking to enter and depart from the said terminal. As a result thereof, the Petitioners, and each of them, acting in concert with each other, did strike, committed a tie-up and work stoppage and that the same continued for a period of several weeks (R. 19). All of the foregoing is completely contrary to Section 1 of Article VIII quoted hereinabove, and other provisions of the contract.

The Petitioners have endeavored to excuse their conduct by merely stating that they had the right to *refrain from crossing a picket line.* As the record clearly shows, the individual six Petitioners not only deserted their posts, *without any notice whatsoever,* but *joined the strike line and actively and physically participated in committing tie-ups and a work stoppage* as far as the business of the Respondent was concerned (R. 19).

In addition, all of the Petitioners violated Subsection (g) of Article VIII (R. 9) when they refused to discuss or submit to the grievance procedure. As pointed out by the United States Court of Appeals for the Sixth Circuit, the Petitioners also violated Article IX as follows:

> "The insistence by any employer that his employee . . . go through a picket line after they have elected not to, and if such refusal has been

approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such employer's operations *without any needs of the Union to go through the grievance procedure herein*" (R. 29).

There is no allegation in the complaint that the refusal to go through the picket lines was given such approval. No allegation could be made because the employees left and joined the picket line without taking the matter up with the Respondent, the Central States District Council or anyone else except their Union.

Likewise, the Union failed to prevent a strike or to effect a fair settlement, or to do anything to minimize the strike in derogation of the following paragraph of Article IX:

> "The Union agrees that, in the event the employer becomes involved in a controversy with any other Union, the Union *will do all in its power* to help effect a fair settlement."

Although under the contract, the Union, as above, is to "do all in its power" to help effect a fair settlement, it did nothing whatsoever except to have its Business Agent and Steward to inform that Local 89 was on strike against this Respondent (R. 18). Thus, the Union failed *to attempt* any means of a settlement or clearance through the Central States Drivers Council, *or even discuss the proposed strike with the Respondent*, all contrary to Articles VIII and IX of the contract as well as being in opposition to the

provisions of Section 204(a) (29 U.S.C. Sec. 174) which places a co-equal obligation upon the Union to cooperate for the purpose of settling amicably controversies in question. The pleadings fail to reflect that the Union *complied* with any of these. Therefore, they do not state a cause of action.

It will be further observed that if the Union did not authorize the strike, the Respondent had the "sole and complete right" to discharge immediately any employee who had participated in the work stoppage for a period of twenty-four hours (R. 25).

From the pleadings, it is conclusive that a strike and work stoppage were precipitated by the Petitioners herein without giving *any* notice whatsoever to the Respondent, all contrary to the provisions of the contract and in opposition to the very principles which caused the Respondent to enter into it, that is, "to live and let live."

When the work stoppage, tie-up and strike were engaged in without notice by these Petitioners, the Respondent had no choice except to make other arrangements for handling its business, which it did on or about February 1, 1960, by separate agreement with an independent contractor (R. 20), and which system is still utilized by the Respondent.[1]

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[1] In *United Steelworkers of America* v. *New Park Mining Company*, 273 F. 2d 352, it was pointed out that courts have affirmed the right, whether inherent or expressed, to sub-contract work usually performed by employees, without violating its bargaining contract even though its action brought the contract to an end before its expiration date, and cites numerous cases therein. The initial precipitation, however, was caused by the breach of the contract when the Petitioners, without notice, joined the strike line in an *affirmative* manner.

The Petitioners, and each of them, were instantaneous in dealing strong blows to the Respondent, and without any prior notice whatsoever to it. These actions breached and terminated the collective bargaining agreement which had not been in effect since the Petitioners abandoned their posts of employment. When they came back two and one-half weeks later on February 16, 1960, seeking reinstatement, back wages, vacation benefits, etc., the door had been opened by them, but "the hall was empty." From the pleadings and the exhibits themselves, it is readily apparent that the Petitioners not only breached and terminated the contract by their unseemingly conduct, but they, believe it or not, came back on February 16, 1960, and requested reinstatement, back pay, etc., and when they were rightfully refused, they then, for the first time, directed their thought towards the grievance procedure which was no longer available after the Petitioners elected to and did breach the contract. This is simply a case where the Petitioners desire to "have their cake and eat it too."

It will be observed that the Respondent *definitely denies* that the grievance award was processed through the channels as "provided in the contract" (Third Defense, R. 16).

Likewise, the First Defense of the answer and counterclaim (R. 16), raises the insufficiency of the allegations contained in the complaint to state a proper cause of action in view of the provisions of the agreement itself. Factually, and legally, the complaint fails to state a cause of action in light of the contract, a

complete copy of which was filed with the complaint and presumably is with the original record herein as requested by the Respondent.

V.

Additional Points and Authorities Relied Upon by the Respondent.

1. In addition to the *Westinghouse* case, *supra*, and the "eclectic theory" announced therein, which is to the effect that the bargaining contract is not a contract of individual hire, the decision in *Communications Workers of America, AFL-CIO* v. *Ohio Bell Telephone Co.*, 160 F. Supp. 822, affirmed in 265 F. 2d 221, Sixth Circuit Court of Appeals, Cert. denied, 361 U. S. 814, also is *precisely* in point. This case involved wages of striking employees, pension fund, vacation allowances, sickness and death benefits, just as in instant case. Again, this Court has ruled that uniquely personal rights of an employee are not subject to Section 301. The refusal of this Court to grant certiorari in this case is an *affirmation and not a deviation* from the principles pronounced in the *Westinghouse* case.

2. In *Textile Workers Union* v. *Bates Manufacturing Co.*, 158 F. Supp. 410 (1958), Judge Gignoux distinguished clearly at page 412 as to the differences in the *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, decision and the *Westinghouse* case. As in the last mentioned decision, Judge Gignoux further pointed out that it was a *refusal to pay back wages, and not the underlying*

reason therefor, which precipitated that suit and that such was a "uniquely personal" right and could not be enforced in a federal court. The identical facts and principles apply in this instance.

3. This Court in *Local 174, Teamsters, Chauffers, Warehousemen and Helpers of America* v. *Lucas Flour Company,* 7 L. Ed. 2d 593, 82 S. Ct. —— (decided March 5, 1962), again held that our state courts had concurrent jurisdiction over Section 301 and that the strike in that case was a *violation of the contract.* In that action, it was pointed out that there was a compulsory arbitration clause and that arbitrary striking without resorting to the grievance procedure was a *definite violation.* This Court further observed that in a consistent course of decisions, the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration, *constitutes a violation of the agreement.* Thus, when the six individual Petitioners joined the strike line and acted in concert to and did constitute a work stoppage, they breached the collective bargaining contract and obviated and made moot any further grievance procedure.

4. In *International Ladies' Garment Workers' Union* v. *Jay-Ann Co.,* 228 F. 2d 632, the Fifth Circuit also held there was no federal jurisdiction under Section 301 of the same issues, and that an employer, under the terms of the collective bargaining agreement, would not have to make contributions to the health and

welfare fund because it involved an individual and personal accounting between union members and the employer.

5. Another decisive decision is that of *Local Lodge #2040, International Association of Machinists* v. *Servel, Inc.*, 268 F. 2d 692, certiorari denied (1959), 361 U. S. 884, 80 S. Ct. 155, 4 L. Ed. 120, which was decided by the Seventh Circuit and followed also precisely the principles enunciated by this Court in the *Westinghouse* case, *supra*. The *Lincoln Mills* case, *supra*, is likewise quoted at length in such decision and appropriate distinctions were made. This Court approved such principles and distinctions by denying certiorari as listed above.

6. The Seventh Circuit found the same results in the case of *United Steelworkers of America* v. *Galland-Henning Mfg. Co.*, 241 F. 2d 323, and again denied an accounting.

7. Likewise, in *Textile Workers Union of America* v. *Cone Mills Corporation*, 166 F. Supp. 654 (1958), the United States District Court at Greensboro, North Carolina, came to the same conclusion in keeping with the numerous mandates of this Court.

8. Again, it was held that Section 301 conferred federal jurisdiction only to contracts of "peculiar concern" and not to perfunctory personal accounting claims between employers and employees (*United Mine Workers of America* v. *Lee Roncco, Jr.*, 204 F. Supp. 3, 1962).

9. *United Steelworkers of America* v. *Pullman-Standard Car Mfg. Co.* (1957), 241 F. 2d 547, 552,

is another case reflecting that "unique personal rights" are not within the realm of federal jurisdiction.

The authorities are unanimous in making it clear that the bars will not be lowered so that money claim controversies between employers and employees may flood the federal courts. The *true parties* in this case are the Petitioners who merely desire monetary awards for *themselves*.

VI.

Discussion of Points and Authorities Relied Upon by the Petitioners.

1. Great reliance is had by Petitioners upon *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U. S. 448. Such was merely an action to require the employer to *arbitrate grievances* as its collective bargaining contract required it to do. It did not deal with the collection of alleged unpaid compensation and other benefits claimed under the individual contracts of employment with individual employees, which the Supreme Court dealt a death blow in the *Westinghouse* decision and which is involved solely in instant case.

In the *Lincoln Mills* case, *supra*, the attention of the Court is also respectfully directed to footnote 9 on page 982. It is as follows:

> "Whether there are situations in which *individual employees* may bring suit in an appropriate state or federal court to enforce grievance rights under employment contracts where the collective bargaining agreement provides for arbitra-

tion of those grievances *is a question we do not reach in this case.* Ct. Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U. S. 437, 460, 464, 99 L. Ed. 510, 524, 75 S. Ct. 488; Moore v. Illinois Cent. R. Co., 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577; Transcontinental & Western Air, Inc. v. Koppal, 345 U. S. 653, 97 L. Ed. 1325, 73 S. Ct. 906."

2. The Petitioners cite *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U. S. 17, as a reliance for deviation in the law as established previously by this Court. In that instance, the parties ended their dispute with the Toledo Labor Management-Citizens Committee, a local mediation and arbitration body. It did not involve collection of "uniquely personal" claims, but did involve the enforcement of an award which had been arrived at in a manner purely satisfactory to both parties, irrespective of whether the same resulted from a "contract" or "Statement of Understanding" satisfactory to all parties.

3. Great stress is accorded by the Petitioners to the effect that the so-called "grievance award" in this case was entered in accordance with the contract. This was specifically denied by the Respondent (R. 16, Third Defense). Where the Petitioners *disregarded and emasculated the contract by complete breach, as found by the Sixth Circuit Court of Appeals,* there was not and could not have been any breath or vitality left in the grievance procedure. The collective

bargaining contract was dealt a death blow, *and has not been and cannot be revived,* when the Petitioners physically and affirmatively joined the strike line and *carved out the very essence of the protection given to the Respondent by the contract.*

4. This Court made good law in the *Westinghouse, Ohio Bell Telephone Co., Servel* cases, *supra,* and others, which have proven to *withstand the test of the ages. None* of the cases cited by the Petitioners gives *any* plausible merit or logic for overturning and upsetting the previous rulings of this Court. Their citations are based merely upon far-fetched theory, innuendo and wishful thinking. If federal jurisdiction were invoked, it would prove only a source of harassment and confusion to all concerned, especially the federal courts.

CONCLUSION.

It is respectfully submitted that, in view of the points and authorities cited herein, the decisions of the two courts below should be affirmed.

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